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Constructing the Legal Profession in Modern Japan

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Abstract

This thesis seeks to clarify features in the formation of the modern Japanese legal profession, with particular reference to the development of the judicial system and legal practice.

In the early Meiji period legal practice in Japan was carried out by two groups: qualified lawyers, many of whom were former samurai who tended to focus their attention on politics and the social movements of the day, and non-credentialed legal practitioners, who conducted much of the practical day-to-day representation of clients. The continuity of the legal profession and its practices from the Edo era into the Meiji era and the Westernisation of Japan's judicial systems had established this dual system of qualified and non-credentialed practitioners, as well as hybridised court processes which utilised both adjudication and conciliation procedures.

This thesis also examines the influence of Western lawyers, especially that of English barristers, and the pre-existing legal practice on the law-making process. The findings of the research demonstrate that the consensus view held until now, which portrays foreign legal advisers and judicial officers as having been the codifiers of all Meiji period laws, can be challenged and replaced by another interpretation, namely that the true protagonists of the Westernisation of Japanese legal systems were practicing lawyers.

Finally, the thesis also analyses how the Japanese legal profession established and monopolised its occupational spheres of influence in the 1920s and 1930s. The exclusion of quasi-lawyers from the judicial courts is also discussed in order to clarify this process of professionalisation. The construction of the dual judicial system in the Meiji era and the later exclusion of the quasi-lawyers in particular weakened the integrity of the legal profession, at a time when many of the fundamental functions of Japan's legal system had already been compromised by the nation's militarisation. The justice and fairness of the legal profession's bar qualification system remained in wartime as a small beacon of hope to examination candidates who wanted to believe in the primacy of the legal system.

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Chapter 1 Introduction

Section 1: The Disconnection and Continuity Models of the Japanese Legal Profession

Section 2: The Reception of Law

Section 3: Two Theories of the 'Profession'

Section 4: Outline of Legal Professionalisation in Japan

Section 5: Aims of the Study

Section 1: The Disconnection and Continuity Models of the Japanese Legal Profession

This thesis is intended to clarify features in the formation of the modern Japanese legal profession, with particular reference to the development of the judicial system and legal practice.

Research conducted on the history of Japanese lawyers may be broadly divided into two models referred to here as the disconnection and the continuity models. The difference between the two models concerns their contrasting understandings of the extent to which Japan's rapid modernisation marked a complete break with its past. The country had ended its national seclusion policy in the late Edo period, and began to trade with the West in 1858. Political and legal systems modelled on those of modern Western countries were only fully introduced after the Meiji Restoration in 1868. The disconnection model thus views legal practitioners in the Meiji era (1868-1912) as being members of a profession with little or no connection to the practices of the

preceding Edo era (1603-1868). By contrast, the continuity model emphasises the connection of the legal profession and its practices from the Edo era into the Meiji era.

According to the disconnection model of legal history, the Japanese legal profession as we know it today came into being only when the country had developed into a 'modern' society, that is, in the Meiji era. Although there were clearly persons working in the earlier Edo era who were engaged in the type of legal practices that lawyers typically are involved with, the disconnection model does not describe these practitioners as such, as it holds that lawyers in the modern sense only emerged in the subsequent Meiji era. 'Suit-inn owners' or 'suit-inn proprietors' to use the terminology of Darryl Flaherty, were Edo era legal practitioners who ran hotels for litigants and gave them legal advice before their appearances at magistrates' offices.¹ There are references to such practitioners in pre-Meiji sources, but the disconnection model deems their services to have been different from those of Meiji era lawyers. In contrast, the continuity model posits that Edo era suit-inn owners provided substantially the same kinds of

¹ My use of the expression 'suit-inn proprietors' follows that of Darryl Flaherty in *Public Law, Private Practice: Politics, Profit, and the Legal Profession in Nineteenth-Century Japan* (Cambridge, MA. and London: Harvard University Asia Center, 2013), p.5. I use the phrase 'legal practitioners' for three types of non-credentialed legal practitioners: the *kujiyado shujin* (suit-inn proprietors or owners) and *kujishi* (suit-inn solicitors) of the Edo era, and the *dainin* (proxies or representatives) of the early to middle Meiji era. *Daigen'nin*, who were credentialed by the government as legal practitioners from 1876 to 1892, are identified as 'legal advocates' or simply 'advocates'. For *bengoshi*, who have been continually credentialed by the government from 1893 through to today, 'attorney' is used because the Nihon Bengoshi Rengōkai currently uses that term. In addition, judges, prosecutors and attorneys are referred to as 'lawyers'. I also use the term 'barrister' to refer to those people, including some Japanese, who were qualified as British barristers.

legal services as lawyers did after 1868, especially with regard to their out-of-court services. Furthermore, in the early years of the Meiji era some former suit-inn owners were still allowed to appear in court as proxies, regardless of their non-credentialed status.

Most accounts of Japan's legal history have been written from the point of view of the disconnection model, originally put forward by Masahiro Okudaira in *Nihon bengoshi shi*.² Well-known among readers of Japanese legal history, the book describes the development of the Japanese legal profession by first focusing on the way in which the social disrepute of the Edo era suit-inn owners led to the poor reputation of early Meiji legal advocates, despite them being regulated by the Judicial Staff Regulations and Operating Rules from 1872.³ The lingering of this low estimation can partly be explained by the fact that from 1872 to 1876 there was no examination for legal advocates, and indeed non-credentialed legal practitioners continued to appear in court representing their clients in criminal and civil cases until 1893. Okudaira examines how the poor standing of some of those non-credentialed practitioners forced qualified (credentialed) legal advocates (later attorneys) to make efforts to improve the reputation of their profession. Subsequently, the book describes

² Masahiro Okudaira, *Nihon bengoshi shi* (Tokyo: Gannandō Shoten, 1914).

³ The Judicial Staff Regulations and Operating Rules (Shihō Shokumu Teisei) [Dajōkan Tatsushi, Edict Unnumbered, the Grand Council of State (3 August 1872)] In this thesis I use the words 'proclamation', 'edict' and 'ordinance' to refer respectively to first, second and third rank regulations decreed by the Grand Council of State (the Cabinet) and Ministries.

how these qualified advocates improved their social status through the activities of the nationwide lawyers' association.

The evolution of the Japanese legal profession was further detailed by Takaaki Hattori in "The Legal Profession in Japan: Its Historical Development and Present State" and in *Shokugyōshi to shite no bengoshi oyobi bengoshi dantai no rekishi* by Masao Ōno.⁴ Viewing law as a profession, Ōno shed light on how legal practitioners formed an organisation to further their aim of achieving autonomy from the state. By contrast, other early researchers who referred to suit-inn owners tended to consider the problem only with regard to the social reputation of legal practitioners. In other words, these authors did not address the actual legal practices of suit-inn owners or compare these practices to those of Meiji era legal advocates.

Richard Rabinowitz, whose arguments were based on Masajirō Takikawa's work *Kujishi · kujiyado no kenkyū*,⁵ concluded that although suit-inn owners were similar to solicitors in their practices, they were not actually predecessors of attorneys in the modern sense.⁶ Takikawa broke new ground in investigating the Edo era legal practices of suit-inn owners; his book, in which he examined their activities and role in the judicial system, was

⁴ Takaaki Hattori, "The Legal Profession in Japan: Its Historical, Development and Present State", in Arthur Taylor von Mehren (ed.), *Law in Japan* (Cambridge, MA.: Harvard University Press, 1963), pp.111-152.; Masao Ōno, *Shokugyōshi to shite no bengoshi oyobi bengoshi dantai no rekishi* (Tokyo: Nihon Hyōronsha, 2013 [1970]).

⁵ Masajirō Takikawa, *Kujishi · kujiyado no kenkyū* (Tokyo: Akasaka shoin, 1984).

⁶ Richard W. Rabinowitz, "The Historical Development of the Japanese Bar", *Harvard Law Review* Vol.70, No.1 (1956), pp.61-81.

actually the first monograph on the subject.⁷ Subsequent historical research has studied these practices in more detail and shown, for example, that suit-inn owners provided governmental services.⁸ In a recent study Tadahisa Sakamoto revealed that suit-inn owners were actually part private practitioner, part government officer, because their services were not utilised when commoners living inside Edo brought suit. In those cases, only town officials were expected to support the parties.⁹ In a prefectural case as Sendai clan (han), Masashi Yoshida made clear that there was no private legal service by suit-inn owners in the Sendai castle town as their main works were concerning criminals procedures; call and detention of suspects and accused and storage of belongings such as swords and a like.¹⁰ Takikawa, Sakamoto, Yoshida other Edo era historians seem to have concluded that suit-inn owners cannot be considered as full members of the legal profession, and actually had more in common with lower-ranking government officers. Such research should be considered as part of the disconnection model, in that it can be used to support the

⁷ See also Kazuo Minami, "Edo no kujiyado", in *Bakumatsu toshi shakai no kenkyū* (Tokyo: Hanawa shobō, 1999[1967]); Hiroshi Harafuji, "Kinsei minji saiban to 'kujishi'", in Hideo Otake and Hiroshi Harafuji (eds.), *Bakuhatsu kokka no hō to shihai* (Tokyo: Yūhikaku, 1984).

⁸ Takashi Tsukada, "Soshō to kujiyado", in *Mibunron kara rekishigaku wo kangaeru* (Tokyo: Azekura Shobō, 2000[1989]); Naomi Hōya, "Edo no yadonakama no kisoteki kenkyū: Tabibito no shisyū wo meguru sho-mondai no kenkyū kara", *Ronshū kinsei* No.13 (1991), pp.1-42.; Masashi Yoshida, *Kujiyado · gōyado kara daisho · daigen'nin heno tenkan no katei* [Monbushō kagaku kenkyūhi hojokin kenkyū seika hōkokusho: Heisei 13-nendo~Heisei 15-nendo] (2004).

⁹ Tadahisa Sakamoto, *Kinsei toshi shakai no 'soshō' to gyōsei* (Tokyo: Sōbunsha, 2007).

¹⁰ Masashi Yoshida, "Sendai jōka no goyō ado", in Satoru Fujita (ed.), *Kinsei hō no saikentō: Rekishigaku to hō-shigaku no taiwa*, (Tokyo: Yamakawa shuppansha, 2005).

argument that there was a clear difference between the practices of those in the legal profession pre- and post-1868.

Takikawa's article "Nihon Bengoshi shi gaisetsu" discussed legal practitioners from ancient times to the Meiji era and considered the idea of the continuity model of the legal profession within this Japanese historical context.¹¹ He also attempted to establish the concept of the 'attorney as a historical category', although he did not move far beyond the introduction of the concept. As he did not survey modern legal practice and its practitioners, he left unexplored the difference between pre-modern and modern legal practitioners. Ironically, Takikawa's work has been used by proponents of both the continuity and disconnection models to bolster their arguments.

Takikawa's line of thinking has however been developed by Darryl Flaherty. For the first time in English, Flaherty's work offers readers a detailed analysis of legal practices and the activities of legal practitioners in the Edo era, and the activities of legal advocates in the early Meiji era.¹² He considers how suit-inn proprietors and suit solicitors approved by the shogunate government in the Edo era gave legal advice to support litigants, drafted legal documents on their behalf, negotiated settlements out of court and accompanied their clients

¹¹ Masajirō Takikawa, *Kujishi · Kujiyado no Kenkyū* (Tokyo: Akasaka Shoin, 1984).

¹² Darryl Flaherty, *Public Law, Private Practice: Politics, Profit, and the Legal Profession in Nineteenth-Century Japan* (Cambridge, MA. and London: Harvard University Asia Center, 2013).

to court, even though they were not allowed to represent them directly. Flaherty notes that legal practitioners have existed in various forms throughout Japanese history, and that those in the Edo and early Meiji periods resembled legal practitioners in early modern Europe in terms of the considerable overlap between individuals' engagement in legal practice and government business.¹³ In the Meiji era legal practitioners in Japan began their drive towards professionalisation, mirroring the way in which legal professionals in the West changed their roles within the judicial system in late 19th century industrial society.

Flaherty's book also examines in detail the political activities undertaken by the legal advocates of the Freedom and People's Rights Movement in the early Meiji era. These advocates, he demonstrates, introduced Western legal concepts into Japanese society, such as proprietary rights, freedom of assembly and suffrage. However, Flaherty did not investigate the legal practices of the modern era, and it remains the case that the connection of Japanese legal practice and its practitioners between the Edo and Meiji eras has never been fully studied in either Japanese or English.

Most legal advocates in the early Meiji era, who were known as *daigen'nin*, were originally from the samurai class of the Edo

¹³ *Ibid.*, pp.33-35. Flaherty's arguments are dependent upon defining legal practice as "all specialized work that require knowledge of the language of the state"; this definition was developed by Dietrich Rueschmeyer in "Comparing Legal Professions Cross-Nationally: From a Professions-Centered to a State-Centered Approach", *American Bar Foundation Research Journal* Vol.11 No.3 (1986), p.415-446.

era.¹⁴ These individuals were never suit-inn owners themselves, which was an occupation for commoners. These ex-samurai legal advocates tended to engage with larger-scale political causes, while it is presumed that the ex-suit-inn owners dealt with everyday small claims, whether in or out of court.¹⁵ Legal advocates and non-credentialed legal practitioners (*dainin*) thus co-existed in the early Meiji era, although the latter outnumbered the former by four or five to one.

Some academics have used empirical methods to investigate the work that the *dainin* had been doing in the preceding Meiji era.¹⁶ In this thesis, however, we shall confine our attention to qualified and non-credentialed lawyers and to the continuity of legal practices throughout the late Edo and Meiji judicial systems in order to discuss the continuity model of the legal profession. Former research on this subject has failed to investigate the continuousness of legal practices. Continuity in legal practice

¹² Okudaira, *op cit*, pp.1362-1414.

¹⁵ Masashi Yoshida, "Meiji shonen no aru daisho · daigen'nin no nisshi: 'shutsu Sakai nisshi · dai san-gō' no syōkai", in Harafuji Hiroshi Sensei Sanju Kinen Ronbunshū Kankōkai (ed.), *Nihon hōseishi ronsan: funsō shori to tōchi shisutemu* (Tokyo: Sōbunsha (2000); Masashi Yoshida, *Kujiyado · gōyado kara daisho · daigen'nin heno tenkan no katei* [Monbushō kagaku kenkyūhi hojokin kenkyū seika hōkokusho: Heisei 13-nendo~Heisei 15-nendo] (2004), pp.13-15; Hiroshima Shūdō Daigaku 'Meiji-ki no Hō to Saiban' Kenkyūkai, "Meiji shonen no aru kujishi no kashikin toritate tabi nikki: Uehara Wahee 'Mutsu kikō' (Meiji 4-nen 10-gatsu 14-nichi ~ Meiji 5-nen 5-gatsu 9-nichi) no shōkai", *Shūdō hōgaku* Vol.26, No.2 (2004), pp.117-143.

¹⁶ Seiichi Hashimoto, *Zaiya "hōsō" to chiiki shakai* (Kyoto: Hōritsu bunkasha, 2005); Seiichi Hashimoto, "Daishin'in hōtei ni okeru daigen'nin · dainin: 1875-nen~1880-nen", *Shizuoka daigaku hōsei kenkyū* Vol.14 Nos.3=4(2010), pp.67-96; Yoshihiro Misaka, "Kindai Nihon no chiiki shakai to bengoshi: 1900-nendai no Shigaken'iki wo daizai to shite", *Kwansei gakuin daigaku hō to seiiji* Vol.62, No.1-II (2011), pp.173-256 ; Misaka Yoshihiro, "Meiji-matsu · Taishō-ki Keiji chiiki ni okeru bengoshi to hi-bengoshi: Zoku · kindai Nihon no chiiki shakai to bengoshi", *Handai hōgaku* Vol.63, No.2 (2013), pp.289-343.; Misaka Yoshihiro, "Meiji zenki minji hanketsu genpon ni arawareta dainin: 1877~1890-nen no Keijihan chiki no dainin no jirei", *Handai hōgaku* Vol.63, Nos.3=4, pp.889-921 (2013).

may reasonably be seen to imply the consistency of individual agents. One possible reason for the lack of research on the history of Japanese legal practice and its practitioners from the Edo era into the Meiji era is that historians themselves tend not to be legally qualified. Legal historians may have hesitated to study modern legal history because of their belief that lawyers will view people who are not licensed attorneys as incapable of writing about the history of the profession. Although there are various accounts of the development of Japan's legal system which record the bar's activities, memoirs and chronicles, they rarely examine or even point out how the legal profession was presented and developed as a *profession*.¹⁷ Almost all research on the topic has been done without analysis of the concept of 'the profession' and has merely investigated attorneys' activities from a social or political point of view; furthermore, the vast majority of this research has been published by lawyers, not by historians. The authors mentioned above, all of whom support the disconnection model, are all lawyers: Masahiro Okudaira was a judge and prosecutor and became an attorney; Masao Ōno was an attorney and became a Supreme Court judge; and Takaaki Hattori was Chief Justice of the Supreme Court.¹⁸ Supporting their research are the various works that were published by lawyers' associations, but

¹⁷ Okudaira, *op cit*, pp.82-138; Ōno, *op cit*, pp.12ff; Hattori, *op cit*, pp.111ff.

¹⁸ Masayoshi Koga, the vice president of the Japan Federation of Bar Associations, pointed out the lack of historical research on the legal profession in *Nihon bengoshi shi no kihonteki shomondai: Nihon shihon shugi no hattatsu katei to bengoshi kaisō* (Tokyo: Nihon hyōronsha, 2013[1970]).

these are essentially compilations of their legal documents and contain little or no analysis of the development of law as a distinct profession.

Although a large number of studies have been made of lawyers who participated in political movements or were graduates from the private law schools established in the early Meiji era, historians have shied away from exploring the history of the Japanese legal profession itself.¹⁹ Recent years have witnessed an emerging interest on the part of legal historians in the non-credentialed practitioners who offered legal services in the early Meiji era in specific regions of Japan.²⁰ However, it is crucial that research in this area is integrated in order to provide a full picture of the evolution of Japanese legal practice and its practitioners, both qualified and non-credentialed, from the early Meiji era onwards.

¹⁹ In recent years, some universities (ex-private law schools) have sought to produce school histories by surveying graduates who became lawyers: Yoshihiko Kawaguchi (ed.), *Meiji Taishō machi no hōsō: Tajima Toyooka bengoshi Batai Tsurunosuke no hibi* (Tokyo: Hōsei daigaku gendai hō kenkyūjo, 2001); Kazuhiro Murakami, *Nihon kindai hōgaku no yōran to Meiji Hōritsu Gakkō* (Tokyo: Nihon keizai hyōronsha, 2007); Kazuhiro Murakami, *Isobe Shirō kenkyū: Nihon kindai hōgaku no kyōhaku* (Tokyo: Shinzansha shuppan, 2007); Kazuhiro Murakami (ed.), *Nihon kindai hōgaku no sendatsu Kishimoto Tatsuo ronbun senshū* (Tokyo: Nihon keizai hyōronsha, 2008); Kazuhiro Murakami, *Fuse Tatsuji kenkyū* (Tokyo: Nihon keizai hyōronsha, 2010).

²⁰ Seiichi Hashimoto, *Zaiya "hōsō" to chiiki shakai*, 2005; Seiichi Hashimoto, "Meiji shōnen no daigen'nin to hōgaku kyōiku: Shizuoka-ken saisho no menkyo daigen'nin Maejima Toyotarō no baai", *Shizuoka daigaku hōsei kenkyū* Vol.13, Nos.3=4 (2009), pp.59-134; Seiichi Hashimoto, "Daishin'in hōtei ni okeru daigen'nin · dainin: 1875-nen~1880-nen", *Shizuoka daigaku hōsei kenkyū* Vol.14, Nos.3=4 (2010), pp.67-96; Yoshihiro Misaka, "Kindai Nihon no chiiki shakai to bengoshi: 1900-nendai no Shigaken'iki wo daizai to shite", *Kwansei gakuin daigaku hō to seiiji* Vol.62, No.1-II (2011), pp.173-256; Yoshihiro Misaka, "Meiji-matsu · Taishō-ki Keiji chiiki ni okeru bengoshi to hi-bengoshi: Zoku kindai Nihon no chiiki shakai to bengoshi", *Handai hōgaku* Vol.63, No.2 (2013), pp.289-343; Yoshihiro Misaka, "Meiji zenki minji hanketsu genpon ni arawareta dainin: 1877~1890-nen no Keijihan chiki no dainin no jirei", *Handai hōgaku* Vol.63, Nos.3=4 (2013), pp.889-921.

I find the continuity model of the Japanese legal profession persuasive, and I view both the legal practices and the ideals of the legal profession of the late Edo era as having much in common with those of the early Meiji era. The early Meiji legal field in Japan accommodated qualified lawyers, many of whom were former samurai who often focused their attention on politics and the political movements of the day, as well as non-credentialed legal practitioners, who conducted the practical day-to-day representation of their clients. In my view, these formal and informal groups both helped craft the modern Japanese legal profession. The Meiji government and the Ministry of Justice planned from the beginning to create a system which featured both formal and informal elements. The continuity model can be used to explain this dual system of the legal profession. In order to examine how Edo era legal practitioners both maintained and adapted their practices as they moved through the Meiji Restoration into the new era, I introduce a reception model of the legal profession as a sub-set of the continuity model. The reception model considers that the construction of the legal profession in modern Japan was an acculturation of Edo era practices achieved by adapting the laws and legal systems of western countries following the Restoration.

The Meiji Restoration of 1868 and Japan's consequent Westernisation exerted a great influence on the political, economic and legal systems that had been established in the

preceding Edo era, and it is therefore no surprise that there exists a considerable number of studies of continuity, and discontinuity, in these systems between the two eras. Little attention however has been given to the legal practitioners themselves or to the actual legal practices they were engaged in through the years around the restoration. The reception model offers a key to understanding the ways in which legal practitioners sought to both preserve and change their personal identification, practices and ideals. The Reception model emphasises three key factors: the direct encounter with a Western legal profession, the contributions made to the legal system by practicing lawyers (including foreigners) and the merging of features from the incoming Western legal system with those from the inherited Edo era legal system to produce a new dual, or hybrid, system of legal practices. However, before we come to examine the continuity of the legal profession with reference to these respects, we must draw attention to various features of the professionalisation of legal practitioners in the modern period.

The first question to be discussed in the introductory chapter is the concept of the 'reception of law'. The reception of law has been one of the central themes in legal history since the late nineteenth century; it refers specifically to the reception of statutory laws, rules and jurisprudences. However, the present thesis breaks new ground in that, rather than concentrating on the nature or content of legal imports, it looks

at *how* the legal profession, in this case in Japan, received these laws. The profession itself, rather than the laws, is the main topic for examination here. It is worth noting that this new understanding of the term 'reception of law' may require some re-examination of the concept itself. Secondly, we will discuss two theories of 'the profession', namely value-based theory and profit-based theory, in order to analyse the salient features of the profession and understand more fully the key developments in modern Japanese legal history. Value-based theory will be used to analyse various features of the Japanese legal profession between the 1870s and 1890s, and profit-based theory will be employed to examine the 1900-1930s period. In the third and final section of this introduction I present an outline of this thesis in order to clarify the key features in the formation of the modern Japanese legal profession, especially with regard to the development of Japan's dispute resolution system and its legal practices.

Section 2: The Reception of Law

In this thesis I use the term 'reception of law' to refer to the whole process of the introduction of Western laws, their adoption, adaptation and assimilation, and the acculturation that arose as a response to these changes. The concept of the reception of law originated in the reception and assimilation of Roman law by Western European countries in the mediaeval period; the most famous and important example was the introduction of the Digest (Pandects), a Justinian code of Roman law, into German societies.²¹ The concept was revived in the late nineteenth century by such academics as Sir Henry Sumner Maine (1822-1888), a professor of both Cambridge and Oxford Universities, and Professor Joseph Kohler of Berlin University (1849-1919), who applied the concept to the phenomenon of the introduction of modern European laws into non-Western societies' legal codes, such as those of India, Turkey and Japan.²²

²¹ In the continental European countries "reception at first took place through the teaching and study of Roman law in university law schools and the work of the glossators or commentators on the 'civil law', as it is known after Justinian's *Codex Juris Civilis*." Bruce H. McPherson, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Queensland Library, 2007), p.6.

²² It was their strong concern with comparative law that established law as a new academic field, and the reception of law came to have a wider definition during this period. Maine and Kohler had communicated with Nobushige Hozumi (1855-1926), a barrister and one of the three drafters of the Meiji Civil Code. Hozumi declared that the Japanese Civil Code was a successful outcome of the comparative study of various legal systems in European countries at the International Congress of Arts and Science held in Saint Louis, Missouri in 1904. According to Hozumi, the enactment of the Meiji Civil Code represented a major shift in the Japanese legal system from the 'China Law' group to the 'European Law' group. The backbone of his argument lay in Henry Sumner Maine's macroscopic theory of legal development which enabled Hozumi to connect his discussion to contemporary worldwide debates. See Nobushige Hozumi, "Hōritsu godai zoku no setsu", in *Hozumi Nobushige Ibunshū: Vol.1* (Tokyo: Iwanami shoten, 1932 [1884]). Maine also insisted that even English lawyers should learn the Roman Civil Law system in order to take advantage of the logical and systematic approach developed in the *Pandekten* system. See Sir Henry Sumner Maine, *Village-communities in the East and West* [New ed.] (London: J. Murray, 1890), p.334. For the influence of Maine on Nobushige Hozumi, see Masasuke Ishibe, "Hozumi

Japanese language studies of the reception of law have been marked by their emphasis on the influence of imported laws and systems upon the society. Academics have differentiated between two styles of reception, namely coercive and spontaneous. This division has contributed towards other binary categorisations: entire versus partial; unitary versus selective; and single versus mixed. In general a country which was not colonised was able to select the kinds of laws or articles that should be introduced into the society; the spontaneous reception of law could therefore be partial, selective, mixed or multinational. To be able to analyse fully the phenomenon of the reception of Western-style legal systems into Japan we must firstly identify what was introduced from the West before proceeding to a careful investigation of the assimilation process of these adopted laws and systems.

2-1 The Received 'Objects of Law'

The introduction of Western-style laws, rules, legal doctrines and ideas into non-Western societies has been well studied in previous research;²³ the reception of the French Napoleonic Code

Nobushige to hikaku hōgaku" in Tadashi Takizawa (ed.), *Hikaku hōgaku no kadai to tenbō* (Tokyo: Shinzansha shuppan, 2002).

²³ For previous research, see Makiko Hayashi, "Nihon ni okeru hō no keiju ni kansuru rironteki kenkyū no kentō", in Takeshi Mizubayashi (ed.), *Higashi Ajia hō kenkyū no genjō to shōrai: dentōteki hōbunka to kindaihō no keiju* (Tokyo: Kokusai Shoin, 2009); Hiroyuki Matsumoto, Masahisa Deguchi (eds.), *Minji soshōhō no keiju to denpa* (Tōkyō: Shinzansha shuppan, 2008); Masahisa Deguchi, Marcel Storme (eds.), *The Reception and Transmission of Civil Procedural Law in the Global Society: Legislative and Legal Educational Assistance to Other Countries in Procedural Law* (Antwerpen-Apeldoorn: Maklu, 2008).

and German Civil Code into Japanese society has been particularly well-researched. By contrast, the literature has barely been touched upon the people responsible for the daily practice of these laws. Former examinations have focused on certain laws, on specific cases and political movements and campaigns, and on a few celebrated figures, but have not analysed the legal profession itself or legal professionals themselves as products of the reception of Western laws and legal systems. In the present thesis, therefore, those people who applied these laws to Japanese society and operated them in practice, including lawyers from Britain, are themselves considered to be one of the agents of reception, objects that took the form of the 'professional'. In the Japanese case, the legal profession itself, not just its constituent parts, was imported and assimilated into society.

According to Zentarō Kitagawa, what was introduced included "codes, drafts of codes, consuetude, judicial precedents or cases, and legal theories".²⁴ Indeed, the draft code of one country can be introduced to another society and enforced before the originating country has done so.²⁵ The draft version of the German Civil Code was used to create the Japanese Civil Code; this was finally enacted in 1898 and enforced in 1899, although the German

²⁴ See Zentarō Kitagawa, *Nihon hōgaku no rekishi to riron* (Tokyo: Nihon hyōronsha, 1968); Zentarō Kitagawa, "The Theory Reception: One Aspect of the Development of Japanese Civil Law Science" (translated by Ronald E. Lee), *Law in Japan* Vol.4, pp.1-16 (1970); Zentarō Kitagawa, "Development of Comparative Law in East Asia", in *The Oxford Handbook of Comparative Law* (edited by Mathias Reimann and Reinhard Zimmermann. Oxford and New York: Oxford University Press), pp.237-260, 2006).

²⁵ For example, the Japanese civil code of 1898 was influenced by the second draft of the German civil code, and was enacted first.

Civil Code (Bürgerliches Gesetzbuch, BGB) was not enforced until 1900. Masao Fukushima, however, took a broader view than Kitagawa, judging that ideology, doctrines and enforcement were also intrinsic to the understanding of law that was imported from the West, along with the codes and precedents.²⁶ This wider definition of what had been received has had significant resonance for research in the fields of legal culture, legal sociology and legal history. It has brought these disciplines into line with cultural anthropology, and helped an appreciation of legal analysis, at least in part, in terms of its influence on society and law-in-action. At the same time, Fukushima emphasised that it is only statute law that can by definition be *legally* enforced on a nation's people, and that it can be imposed by state power and authority with legitimacy.²⁷

Kahei Rokumoto has noted the importance of Weber's definition of law, which has wider implications than those of Kitagawa or Fukushima:

"[T]he coercive apparatus is put in place precisely to provide an external guarantee for the empirical realization of the legal norms that are regarded as valid on other grounds, quite independently of their being coercively

²⁶ Masao Fukushima, "Hō no keiju to Shakai=Keizai no kindaika", in Michiatsu Kaino (ed.), *Fukushima Masao Chosaku-shū Vol. 6: Hikaku hō* (Tokyo: Keiso shōbō), p.59.

²⁷ *Ibid.*, p.101ff.

enforced. The availability of the coercive apparatus is a necessary condition for Weber's definition of law, obviously because of the particularly great significance it possesses as an 'actual determinant of human conduct', especially in relation to his own preoccupation with law's influence over economic activities".²⁸

Weber explains the validity of a social norm in terms of the actor's 'orientation' to maxims regarded as binding or exemplary.²⁹ This definition of law encompassed the human conduct of the law; in other words, it acknowledged that law consisted, at least in part, in its operation; the operation, not the mere introduction or codification, was what made it 'law'.

For the purposes of this thesis, therefore, that which was received from the West is taken to include not only laws and rules but also the legal profession itself and the systems employed by those professionals charged with its operation.

2-2 The Process of Reception and Assimilation

The relationship between imported laws and recipient societies or cultures can be evaluated by considering whether or not the society in question can fully accept and utilise any transplanted

²⁸ Kahei Rokumoto, "Introduction", in Kahei Rokumoto (ed.), *Sociological Theories of Law* (Aldershot, England: Dartmouth Publishing, 1994), pp. XVII-XVIII; Max Weber, *Economy and Society*, Vol. 1, (ed. by Guenther Roth and Claus Wittich) (California: University of California Press, 1978), p.31.

²⁹ Rokumoto, *op cit*, pp. XVII-XVIII.

laws, which happen not to have any connection to their own local and traditional laws and with inherent culture. Alan Watson, a distinguished scholar of Roman law and comparative law, has emphasised that the autonomy of law allows a functional approach, which assesses whether each clause or provision can operate within a legal milieu without strong links to society, politics and culture.³⁰ He argues that it is common for legal systems to be exported to other societies, and that such transplantations are fundamental to the development of legal systems everywhere.³¹ Codes can easily be transplanted into other legal systems, despite the legal conditions pertaining in the recipient societies.³²

Watson however has paid little attention to the process of the assimilation of law into the recipient society, which is key to this thesis; he focuses upon the codes themselves. Contrasting with Watson's approach, the adaptation and assimilation of laws and systems into a recipient society is seen here as the fundamental element of legal reception by a number of scholars, who use this as the basis for their analyses of law-in-action. Pierre Legrand underlines the importance of the relationship between imported law and inherent culture and the ability of the former to discipline or change the recipient's own traditional society:

³⁰ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974).

³¹ See also W. Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants", *American Journal of Comparative Law*, No. 43 (1995), pp.489-510.

³² See Watson, *op cit*, pp.21-30 and Michihiro Kainō, "G. Teubner no hō no ishoku ni kansuru giron ni tsuite", *Dōshisha hōgaku* Vol.53, No.5 (2003), pp.55-59.

"The conception of law as a discrete subsystem of legal rules within society, operating independently from society, must be abandoned. It has to be understood that the "legal" cannot be analytically separated from the "non-legal" reality of society because the two worlds are inextricably linked."³³

Moreover, Legrand takes a sceptical view of the unification of common law and the civil law system and of the creation of a unified code, even within European societies.³⁴ Roger Cotterrell has also criticised Watson's view as advocating a "sociology-free comparative law" that prevents the interaction of legal sociology and comparative law.³⁵ This marks a break with traditional understandings, which have always viewed the difficulty of any particular legal transplant as being dependent upon the field of law. For instance, transplanting family law was considered more problematic than commercial law. Cotterrell however argues that the effects of legal transplants are determined by the nature of

³³ See Pierre Legrand, "European Legal Systems Are Not Converging", *The International and Comparative Law Quarterly* Vol.45 No.1 (1996), p.58 and Kainō, *op cit*, p.49.

³⁴ Legrand questioned whether or not the idea of a European Civil Code could be supported; his answer was emphatically that it should not be. He argued that legal monism (that is, the exclusive and unchallenged supremacy of written law) has given way to a multiplicity of legal sources, or to 'polyjurality' (Pierre Legrand, "Against a European Civil Code", *The Modern Law Review* Vol.60, No.1 (1997), pp 44-63).

³⁵ Roger Cotterrell, "Is There a Logic of Legal Transplants?" in *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (London: Ashgate, 2006[2001]), pp.45-64.

the recipient communities themselves, rather than by the contents of the received laws, and furthermore that the variable nature, condition and situation of societies might create difficulties in transplantation. Cotterrell notes that "a legal transplant will not be considered significant (or perhaps as occurring at all) unless law can be shown to have social effects in the recipient society. The success of the transplant will be judged by whether or not it has the effects intended, which were the reason for it."³⁶ Indeed, successful receptions of law lead to the community forgetting that the laws were originally imported from a different culture; in the case of Japan, the legal profession seems to have forgotten that the whole system was an import.³⁷ A Cotterrell-type analysis of the assimilation process of the legal profession is crucial to this thesis. The approach adopted here is that legal practitioners were the crucial agents or carriers of legal Westernisation under the assimilation process, and that these people themselves were the objects of the reception of law.

Research on the reception of Western-style law into Japan has largely viewed it as having taken place over a lengthy period,

³⁶ Cotterrell considered the 'success' of legal borrowing; "Important sociological ideas have been put forward as to why transfers of law succeed or fail. What seems necessary is to try to integrate these ideas with those of recent work that emphasizes the strength of legal professional traditions, styles, discourses, outlooks and practices in different legal systems" (Roger Cotterrell, *op sit.*, p.116).

³⁷ David Nelken also refers to the success of legal transfers: "But it is more difficult to decide what baseline we should use for determining whether a transfer has been successful...Is it safe to assume that the goal of legal transfer is to produce greater harmonisation of social behaviour (and whose behaviour?) and not just harmonisation of rules and decisions?" (David Nelken, "Towards a Sociology of Legal Adaptation", in David Nelken and Johannes Feest (eds.), *Adapting legal cultures* (Oxford: Hart Publishing, 2001), pp.7-54.

and for this reason such studies have tended to split the process into sub-periods. Yoshiyuki Noda, for example, divided it into three: the adoption of codes, which mainly meant copying Western laws and systems (1868-1898); the adoption of legal theories with a strong German influence (1899-1910); and adoption/assimilation tempered with an increased awareness that Japanese laws have their own characteristics which differ from those of the 'mother laws' (1910 onwards).³⁸ In many ways it is the middle period that is most striking. Indeed, one of the most significant facts pertaining to any study of Japan's reception of Western law is that from 1899 to the 1910s virtually all Japanese lawyers and legal scholars studied German legal theories (Noda defined this as the period of German influence), and that furthermore this study took place without much attention being paid, or much weight being given, to any disparities at the time between Japan and Germany. During this period Japanese scholars and lawyers applied German legal theories to Japanese cases and used them to interpret Japanese codes. This use of German legal theory led to the integration of many laws and practices, imported earlier from more than thirty countries, into a consistent code and system.³⁹ The process of assimilating this unified legal system into Japanese society was completed during the 1920s.

³⁸ Yoshiyuki Noda, "Nihon niokeru gaikokuhou no sesshu: Josetsu", in Masami Ito (ed.), *Gaikoku hō to Nihon hō* [Iwanami kōza: Gendai hō Vol.14] (Tokyo: Iwanami shoten, 1966), pp.159-183.

³⁹ Zentarō Kitagawa, "Development of Comparative Law in East Asia", in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford and New York: Oxford University Press, 2006), pp.239-240.

In order to examine the process of adaptation and assimilation of features taken from Western systems of the legal profession into Japanese society, I will employ Noda's division of the period into three phases: 1) the adoption of Western rules for legal advocates and the Attorney Act under the dual legal practitioner system, which saw a continuation of many features of legal practice from the Edo era (1858-1898); 2) the formation of an attorneys' association (under influence from British legal culture) and the development of the legal 'profession' (1899-1910); and 3) the assimilation process of the legal profession and the monopolisation of legal services by formally qualified lawyers (1910s onwards).

Although there is a considerable body of Japanese literature that addresses the reception of law during the early Meiji era, the topics discussed therein are mainly limited to codes, clauses and their drafts. There has been very little investigation of actual legal practices or the legal profession itself. Therefore, this thesis focuses on the relationship between formal and informal legal practitioners both in and out of court, and on the formation of the modern legal profession, all with reference to the legal practices of the preceding Edo era. For the second (1893-1910) and third (1910 onwards) periods, we will apply theories of 'the profession' to analyse these phenomena.

Section 3: Two Theories of 'The Profession'

In order to analyse the reception of the profession of law into Japan, we need to understand the nature of a 'profession' and how professionals are distinguished from technical experts. Two key theories can be employed to examine these questions, namely value-based theory and profit-based theory. Value-based theory was developed by Talcott Parsons, who was the first scholar to pay much attention to the concept of 'the profession'.⁴⁰ Research subsequently greatly expanded in 1950s American sociology in an attempt to catalogue the various traits of the professions by focusing on their social functions.⁴¹

Parsons concluded that professions shared the following traits: altruism, codes of conduct, autonomy, independence, education and qualification systems, formal knowledge and high social prestige. He argued that altruism/public service was considered more important than formalised knowledge, qualifications or social prestige because the professions achieve social integration by exercising a special function, namely mediating between personal profit and the public interest. Parsons

⁴⁰ Talcott Parsons, "Professions", in David Sills (ed.), *International Encyclopedia of the Social Sciences*, Vol. 12 (New York: Macmillan Publishing Co. and Free Press, 1968), pp. 536-547. See also Talcott Parsons, "The Professions and Social Structure", in *Essays in Sociological Theory* [Revised edition] (New York: The Free Press, 1954[1939]), pp.34-39.

⁴¹ B. Barber, "Some Problems in the Sociology of the Profession", *Daedalus* Vol.92, No.4 (1963), pp.669-688; Ernest Greenwood, "Attributes of a profession", *Social Work* Vol.2, No.3 (1957), pp.45-55; Harold Wilensky, "The Professionalization of Everyone?", *American Journal of Sociology* Vol.70, No.2 (1964), pp.137-158. See also William J. Goode, "The Theoretical Limits of Professionalization", in A. Etzioni (ed.), *The Semi-professions and Their Organization* (New York: Free Press, 1969), pp.263-313; Terence J. Johnson, *Professions and Power* (London: Macmillan, 1972).

believed that the key traits of the professions were their placement of the public interest before self-interest, their highly specialised skills, their universality (selection of cases rather than clients) and the limits/scope of their expertise. It was the presence of all these traits, but of altruism in particular, that defined a job as being a profession.⁴²

In his analysis of the legal profession, as opposed to 'the profession' as a generalised concept, Parsons underlined social integration, emphasising that lawyers work to enhance their clients' interests as well as harmonising those same interests with 'a body of norms' or 'rules governing human conduct in social situations'.⁴³ This public interest, i.e. the integration and mediation between clients' private interests and social norms, was logically legitimated by the existence of law. Moreover, modern constitutions and modern law served to standardise and bound social norms for countries which aspired to Westernisation and modernisation, such as Japan. It can be argued therefore that abstract knowledge (such as modern laws and constitutions) could be considered to be a precondition for the legal profession. As agents of formal knowledge, legal professionals became very important in modern society. Value-based theory thus focused upon

⁴² Talcott Parsons, "The Professions and Social Structure", in *Essays in Sociological Theory* (New York: The Free Press, 1954[1939]), pp.34-49; Chihara Watanabe, "Purofesshon gainen ni kansuru ichi Kōsatsu: Amerika no purofesshon ron/bengoshi rinri no giron wo sankō ni", *Ritsumeikan Hōgaku* No.275 (2001) pp.170-179.

⁴³ Talcott Parsons, "A Sociologist Looks at the Legal Profession", in *Essays in Sociological Theory* [Revised ed.] (New York: The Free Press, 1954), pp.370-385.

principles and standards in order to analyse the concept of 'the profession'; values such as public nature and autonomy were used to position the various professions as an essential third pole, along with the market and bureaucracy, in the drive to build and maintain a modern social system.

In contrast to value-based theory, Eliot Freidson and Magali Larson developed profit-based theory in order to focus on self-awareness and the behaviour of professionals. According to Freidson, professionals can be distinguished from technical experts by ascertaining whether or not formal knowledge and systematised theory are required. For example, as part of their everyday role professionals such as doctors, lawyers and the clergy employ formal knowledge in the form of medical science, jurisprudence and theology respectively.⁴⁴ In addition to this formal knowledge, Freidson observed that a unitary trait of all professions is their autonomy, that is, their ability to control their work. Professions have founded and maintained systems of qualification, education and service monopoly in order to establish and consolidate their power to supervise clients or other related occupations, and to position themselves as the dominant partners in any interactions with them whilst avoiding

⁴⁴ Eliot Freidson, *Professional Powers: A Study of Institutionalization of Formal Knowledge* (Chicago and London: The University of Chicago Press, 1986). In this respect an aeroplane pilot, for example, however much a technical expert he or she may be, and despite being well-educated and receiving an excellent salary, might not be classified as a professional. See also Zensuke Ishimura, *Gendai no Purofesshon* (Tokyo: Shiseidō, 1969).

any unwanted interference.⁴⁵ This power to shape one's own professional life, or more broadly that of one's profession, is why this model is known as profit-based theory. The profession and its members retain the exclusive, or almost exclusive, ability to develop their own profession and to control the conditions governing the way in which they provide their expertise.

Larson focused on the professions' collective behaviours, which she identified as their attempts to gain market control and enable social mobility. She sought to examine how the professions organised themselves to attain market power and to professionalise, and how they managed their particular professions in order to have them widely recognised as the process by which producers of special services constituted and controlled the market for their expertise. Professionalisation is frequently manifested as a collective assertion of special social status and as a mutual process of upward social mobility. Larson used the term 'professional project' to refer to the collective aim of these professions to monopolise both market expertise and status within a stratified system.

I will apply both value-based and profit-based theories in order to examine the professionalisation of Japanese law, lawyers and legal practices. Value-based theory is essential for analysing the creation of the legal profession from the late Edo period to 1893, while profit-based theory is useful for understanding the

⁴⁵ *Ibid.*

profession from 1893 onwards.⁴⁶ But firstly, it is important to outline the key steps in Japan's legal professionalisation.

⁴⁶ I employ 1893 as the division between my use of these two theories because this was when the Attorney Act was enacted. After enforcement of this law, attorneys themselves were driving the movement towards legal professionalization, for example via the national organisation they established seeking professional autonomy.

Section 4: Outline of Legal Professionalisation in Japan

A number of clear stages can be identified in the process of legal professionalisation: 1) naming the occupation (1872); 2) establishing lawyers' organisations; 3) introducing examinations in for legal advocates and judges/prosecutors (in 1876/1880 and 1884 respectively) and establishing new education systems; 4) renaming the occupation to gain social prestige (1890/1893); and 5) restricting the activities of non-credentialed legal practitioners. These processes closely map those identified by Magali Larson in *Rise of Professionalism*. However, it is crucial to note that the achievements of the first four stages were made not by the legal profession but by the Meiji government. This thesis will also mention judges' professionalisation, in particular the introduction of qualification systems, because in civil law countries such as Japan the legal profession consists of legal advocates, judges and prosecutors.⁴⁷ During the period (1872 to 1893) covered by these first four stages, we can usefully employ value-based theory to analyse the emergence of the legal profession.

These five stages map onto a number of distinct periods within the process of legal professionalisation. This thesis proposes using three periods in order to clarify the formation of the modern legal profession and its legal practices: the first

⁴⁷ Charles E. McClelland, *The German Experience of Professionalization* (Cambridge: Cambridge University Press, 1991).

period (1858-1883) covers the beginning of the Westernisation of legal practice, and includes stages one to three identified above; the second period (1884-1899) spans the completion of the modernisation of legal practices and the legal profession, and includes the fourth stage (renaming of the occupation) of the professional project; and the third period (1900-1930s) covers the assimilation of modern laws into society and monopolisation of legal services both in and out of court, and includes the fifth stage of professionalisation. We will now turn to discussing each of these three periods in turn, within which the five stages of professionalisation will also be examined.

4-1 The First Period (1858-1883): The Beginning of the Westernisation of Legal Practice

The first period saw the commencement of the *Westernised* modernisation of the legal profession. This thesis uses 'modernisation' to refer to shifts towards an age of individualism under a centralised unified state or unified nations, as opposed to any endemic modernisation that was occurring within Japan, which had been until the late Edo era a country consisting of a large number of decentralised lords' domains premised upon the class system. Although this does not deny the modernity of the Edo period, during which 'modern' cities, cultures and societies were constructed that differed from those of Europe, in this thesis 'modern' implies the formation of a Western-style nation

state and a society based on individuals, the establishment of legal systems such as constructive (fictitious) equality between contract parties and the right to own property. This paper will thus date the modernisation period as commencing with Perry's arrival in 1853 and then moving through the negotiation and conclusion of the unequal treaties, which resulted in the shogunate government opening the country to the West and in practice led to the end of the national seclusion policy. Moreover, from around 1872 the process of forming a modern state and court system began in earnest. As mentioned above, if this thesis might refer to the Edo era as pre-modern in the sense that Westernisation had not reached Japan, this should not be taken to imply that Japan was still in the feudal era, but rather that before the Western intervention late Edo-era Japan was a place that was creating its own form of non-Western modernity.

During this first period (1858-1883) and following the enactment of the unequal treaties trials were held in the consular courts of various Western nations, and from 1872 onwards Japan Westernised its judicial courts and legal profession and practices. In the dual system that I discuss in this paper the legal practitioners of this early period were still using their Edo-era legal methods, but lawmakers were beginning to apply Western legal philosophy to the legislative and judicial systems. One of the purposes of this thesis is to provide greater perspective on how the modernisation or Westernisation of a nation state, especially

its judicial system and legal practices, developed in a society with a non-Western form of modernity. One hypothesis is that using legal practices that had developed in a non-Western society, in this case in Japan's Edo era, actually helped craft the Westernisation of the legal profession and their practices, and that this continuity of legal practitioners and their practices from the pre-Westernised era assisted in the creation of the characteristics of legal modernisation. Continuity in practice and discontinuity in philosophy coexisted within this dual system; indeed, the continued use of pre-existing practices, which were after all 'modern' in the Japanese sense, is a characteristic of Japanese legal professionalisation.

The resolution of everyday conflicts, which had been part of legal practice since the Edo era, continued into the Meiji, but at the same time judges well-educated in Western jurisprudence sat in the major courts and based their practice on Westernised laws, and judicial officials proceeded with compiling Westernised codes: the Criminal Code and the Criminal Procedure Code, much influenced by French law, were both enacted in 1880 and both enforced in 1882. Moreover, qualified legal advocates were engaged in various activities aimed at introducing freedom (such as freedom of speech and freedom to move) and civil rights to Japan. As we shall clarify in Chapter 3, the expansion of the courts and the resultant court rulings (e.g. prohibition of human trafficking and human rights protection) during this first period also

contributed to Japan's active democratisation. It was also characteristic of this period that ordinary people began to engage in civil legal procedures by filing suits freely (with out any guarantee of authorities) for the first time.

Through the combination of this continuity of Edo era legal practices and the discontinuity of legal concepts and ideals, a two-tier implementation of legal practitioners emerged that consisted of the same individuals that had been practising in the Edo era (largely these were ordinary townspeople) plus new samurai-class entrants to the legal profession. This dual system married Edo era law practitioners and their legal practices to the incoming Westernised judicial system, which the Ministry of Justice set about trying to establish.

Judges and judicial officers dealt with civil and criminal cases in judicial courts from 1872,⁴⁸ when litigants were first authorised to use legal advocates in civil cases (authorisation for criminal cases was given in 1876).⁴⁹ Immediately after this edict, the Ministry of Justice began to abolish any Edo era class differentiation in court proceedings⁵⁰ and to open all trials, both

⁴⁸ The Judicial Staff Regulations and Operating Rules (Shihō Shokumu Teisei) [Dajōkan Tatsushi, Edict Unnumbered, the Grand Council of State (3 August 1872)]; Articles 1, 5, 20 and 21.

The Ministry of Justice was formed in 1871 (Proclamation No.337- No.341 (9 July 1871) by taking over civil and criminal jurisdictions from the Ministry of Constabulary and Penalty (Gyōbu shō) and the Ministry of Finance, and by integrating the jurisdictions of the former *daimyo* (feudal lords).

⁴⁹ Former research has assumed that the Judicial Staff Regulations and Operating Rules were stipulated by the Minister of Justice Shinpei Eto and French avocat Georges Hilaire Bousquet (1846-1937), adapting the French and Dutch legal systems (see *Fukushima Masao Chosakushū*, Vol. 1: *Nihon kindaihōshi* (edited by Tamio Yoshii, Tokyo: Keiso shōbō, 1993)).

⁵⁰ Ordinance No.25, the Ministry of Justice (10 October 1872).

civil and criminal, to the public.⁵¹ In 1875 a proclamation defined the ranks and jurisdictions of all judicial courts from the Great Court of Cassation (Supreme Court, or Daishin'in) down to the ward courts; for the first time the judicature was granted independence from the state's administrative power.⁵² This independence was far from total however; despite the notion of the separation of powers, judges could enquire about a particular law or seek confirmation regarding its application by writing to judicial officers in the Ministry of Justice. The effect of this inquiry-order system was to establish a hierarchy between judicial officers and judges.

The first three of the five stages of professional project all fall within the first period I have identified (1858-1883). These three stages are as follows: Naming the occupation; Establishing legal practitioners' organisations; and Introducing examinations and new education systems. These will each now be examined in turn.

Naming the occupation

The 1872 edict⁵³ that authorised litigants to use legal advocates also listed the names of the various legal occupations and their responsibilities, as well as providing for the formation of judicial courts and judicial administrations. Legal practitioners were termed *daigen'nin*, which directly translated

⁵¹ Ordinance No.9, the Ministry of Justice (20 May 1874), Article 8.

⁵² Proclamation No.91, the Grand Council of State (24 May 1875).

⁵³ The Judicial Staff Regulations and Operating Rules (Shihō Shokumu Teisei) [Dajōkan Tatsushi, Edict Unnumbered, the Grand Council of State (3 August 1872)]; Articles 41 to 43.

meant 'those who speak out as substitutes or representatives for clients'; however, neither substantive professional organs nor actual legal practices had yet been established. Other legal practitioners were designated as *daishonin*, meaning a scrivener or public letter-writer who writes on a client's behalf, and *shōshonin*, meaning a public notary limited to dealing with real estate.⁵⁴

Establishing legal practitioners' organisations

The first two legal practitioners' organisations were established in 1874: one was a private law study group organised by Shimamoto Nakamichi within the Risshisha,⁵⁵ and the other a private group of legal advocates and scriveners in Osaka, named Hokushūsha. Notably, these private groups were independently formed before the government's 1876 edict on the profession of legal advocacy (*daigen'nin kisoku*).⁵⁶ From 1880 onwards legal advocates in every district court were obliged to join a local lawyers' association established by the Ministry of Justice, so that they might be supervised by the chief prosecutor of each district court.

Introducing examinations and new education systems

In order to control the quality of legal practitioners, in

⁵⁴ The public notaries, *shōshonin* (later, *kōshōnin*), did not have (and still do not have) a strong presence in society.

⁵⁵ The Risshisha was a political group campaigning for liberty and human rights in Tosa, now Kochi Prefecture. See Flaherty, *Public Law, Private Practice*, pp.138-141.

⁵⁶ Edict Kō No.1, Ministry of Justice (2 February 1876). See Okudaira, *op cit*, pp.82-138; Osaka Bengoshi-kai (ed.), *Osaka Bengoshi-kai Hyakunen-shi* (Osaka: Osaka Bengosikai, 1989), pp.18-35. See also Flaherty, *Public Law, Private Practice*, pp.141-143.

1876 the government introduced a governmental examination for the first time. However, the exam itself clearly illustrated the lack of legal ability and knowledge of the prefectural officers charged with its administration. Some of the questions in the examination were so worthless that candidates became angry; the Tokyo examination was cancelled and rescheduled for later in the same year. The difference in level between the examinees and the prefectural officers was due to the fact that the examinees had been studying law and jurisprudence in their private groups, whilst the examiners had never studied law at all.⁵⁷ From 1880 onwards the legal advocate examination came under the jurisdiction of the Ministry of Justice and thus an exclusive state affair, and became considerably more challenging.⁵⁸ Despite the introduction of this judicial state examination, however, non-credentialed legal practitioners continued to be allowed to appear in court until 1893; some non-credentialed practitioners even found ways to continue working for their clients into the early 20th century, for example by pretending to be family members of the litigants.

4-2 The Second Period (1884-1899): The Completion of the Modernisation of Legal Practices and the Legal Profession

I have cast the second period of professionalisation (1884-1899)

⁵⁷ Okudaira, *op cit*; Ōno, *Shokugyōshi to shitenō bengoshi oyobi bengoshi dantai no rekishi*, pp.12-13.

⁵⁸ Edict Kō No.1, Ministry of Justice (13 May 1880).

as the completion phase of the modernisation of the legal profession and legal practices. From 1884 the Meiji government changed its policy of supporting private individuals in filing civil lawsuits and instigating in-court conciliation, and began to make it difficult for litigants to do so. They placed practical limits (e.g. increases in litigation fees) on non-credentialed proxies in court. At the same time the government decided to stop allowing foreign-qualified lawyers (whether Japanese or foreign nationals) to practise in Japanese courts, although they could continue to work for clients in court as non-credentialed legal practitioners. Moreover, in 1884 the Ministry of Justice also introduced a judges' examination and began to appoint those who had passed it. Successive governments from this period onwards sought both to discourage the filing of lawsuits through such devices as increased fees and to raise the barriers to entering the legal profession through the introduction of rigorous legal examinations. On the other hand, non-credentialed practitioners continued to act in court as they had in the first period. Despite promoting modernisation, the state reluctantly acknowledged the need to utilise non-credentialed practitioners in court.

The disparity between the respective levels of legal knowledge achieved by the legal advocates and judges was gradually reversed after 1884, when the first examination for judges was introduced. This examination was considerably more difficult than that for legal advocates, and so those individuals who passed the

examination had demonstrated that they possessed a higher level of legal knowledge than both legal advocates and those judges already practising prior to the exam's introduction.⁵⁹ However, this was a slow shift in balance: only three candidates passed the first judges' examination, held on 1 August 1885, and even in the late 1890s the national body of judges still consisted of people drawn from a wide variety of backgrounds. For example, some men who had fought on behalf of the government forces during the Meiji Restoration and the following battles were appointed as judges as a reward for their services.

The main differences between judges and legal advocates arose through their different, and separate, education. The Imperial University (Teikoku Daigaku, later Tokyo University) and the Ministry of Justice law school supplied judges, whilst private law schools (later, private universities) trained legal advocates (attorneys); furthermore, graduates from the Imperial University and Ministry of Justice law schools were able to become legal advocates without any examination.⁶⁰ Moreover, access to further training and education after certification as a legal professional differed for judges and attorneys. Unlike British barristers, Japanese attorneys and the bar never had their own formal education system. The education of lawyers was the responsibility of Imperial University, the Ministry of Justice and private

⁵⁹ Proclamation No.102 (26 December 1884).

⁶⁰ See Chapter 3 of this thesis.

universities; indeed, private universities have taken the lead role in preparing candidates for legal advocates' examinations ever since the system's inception in 1880.

The greater difficulty of the judges' examination helped shape the rank of legal profession after the forced retirement in 1898 of judges lacking Western legal knowledge. Judges sat higher within the legal hierarchy; this was made explicit by the fact that judges could work as legal advocates without having to pass the legal advocates' exam, whereas the opposite was not the case. Indeed, the legal advocates' test itself was subsequently changed from one involving case methods to one of jurisprudence, showing the influence of the judge's exam.

Renaming the occupation to gain social prestige

The only stage to fall within the second period is the fourth stage, which is concerned with the renaming of the profession. During the codification of the Court Organisation Law of 1890⁶¹ a British barrister suggested to the Japanese compilers that the role of legal practitioner should be renamed,⁶² and so from this law onwards the term used for legal advocates changed from *daigen'nin* to *bengoshi*. *Bengo* has various meanings, including defence, plea, advocacy and vindication, whereas *daigen* means representative or proxy. Renaming is a very important stage for

⁶¹ Law No.6 (10 February 1890).

⁶² Hōmu Daijin Kanbō Shihō Hōsei Chōsabu kanshū (ed.), *Nihon kindai rippō shiryō sōsho* Vol.25 (Tokyo: Shōji hōmu kenkyūkai, 1986). The barrister was William Montague Hammett Kirkwood, whom we will discuss in Chapter 2.

any occupation going through professionalisation, as it serves to demarcate very publicly a particular field of work and its workers from all others. This renaming of legal advocates took effect immediately, preceding by three years the 1893 enactment of the Attorneys Act.⁶³

Prosecutors' control over the legal advocates' associations was not questioned by legal advocates themselves until 1896 but from that time control became a major issue of contention with the Ministry of Justice, along with the division of bar associations along district court lines, as this obstructed legal advocates from founding a nationwide bar association. In order to circumvent these two issues - that is, of friction between prosecutors and legal advocates and of having one bar association for each district court - the Tokyo Bar Association formed a private national bar association (*Nihon bengoshi kyōkai*) in 1897

From the beginning of the second period (1884-1899) the compilation work of Western-styled codes was stepped up and as a result the Imperial Constitution (1889), the Criminal Procedure Code (1890) and the Civil Procedure Code (1890) were enacted, and the first Imperial Diet was held (November 1890). Conciliation in court was abolished and the Japanese courts concentrated on adjudication procedures only, which was seen by judicial officers as the Western means of dispute resolution; this will be discussed in detail in Chapter 4. Furthermore, the Civil and Commercial

⁶³ Law No.7 (4 March 1893).

Codes were enforced in 1898 and 1899 respectively, at which point all those codes seen as fundamental for modern society in civil law countries such as Japan were in place. At the same time judges without Western legal knowledge were forced to retire, notwithstanding the constitutional guarantee of judges' status. In this way, and as will be discussed in greater detail in Chapter 5, Japan's legal qualification system was tightened up as an integral part of the modernisation of the entire judicial system. Despite these changes, continuities from the Edo era enabled the evolution of a dual judicial system, allowing courts to respond flexibly in accordance with the progress and depth of modernisation in their respective regions and at their level of the judicial hierarchy, from local ward courts up to the Supreme Court.

4-3 The Third Period (1900-1930s): The Assimilation of Modern Laws into Society and Monopolisation of Legal Services

The third period (1900-1930s) saw the full assimilation of modern legal systems into society and a clearer and more detailed differentiation of legal roles. In general the introduction of new legislation had been completed by this period, and Japanese judges, attorneys and law professors were now preoccupied with studying German cases and seeking to apply German legal interpretations to Japanese court cases and to the codes which governed them. This process was crucial in removing any

contradictions, whether textual or interpretive, which had been introduced as a result of importing laws and codes from a number of different countries. The other key development of the period, from around 1915 onwards, was the effort to formally control and relegate other legal roles to lower position within the legal hierarchy. This process was partly driven by attorneys themselves, as some of them were also MPs and were thus able to submit drafts calling for such measures to be introduced.

Restricting the activities of non-credentialed legal practitioners

The only stage to fall within the third and final period is the fifth and final stage, which is concerned with restricting non-credentialed involvement in legal practice. Throughout the late 1910s and up to the 1930s restricting the activities of non-credentialed legal practitioners was an important objective of those attorneys seeking to monopolise legal services. The existence of non-credentialed legal practitioners, or *dainin*, was seen as a necessary evil; it was an informal system required in order to supplement the numbers of qualified lawyers in the Meiji era. Their activities in local districts, which ranged widely from appearances in court as representatives to settlement of disputes and the giving of legal advice, formed the popular image of the lawyer; undeniably, some of them tarnished their profession's name. Thereafter, however, the *bengoshi* monopolisation of qualified lawyer status changed the social position of the *dainin* and the

relationship between the two legal classifications by serving to gradually exclude the latter group from judicial courts. Moreover, during this period, qualified lawyers and the association helped other quasi-legal practitioners such as scriveners, patent agents and accountants to establish lesser legal professions. These processes helped to establish a hierarchy within the ranks of legal professionals, with *bengoshi* at the top, scriveners and others in the middle and *dainin* or law firm clerks at the bottom.

In the early 1920s, as discussed in detail in Chapter 4, the number of attorneys increased rapidly due to changes in the judicial examination system. Attorneys' average incomes, especially for new entrants, fell dramatically and many young attorneys raised this issue with their associations. At the same time business activities internationalised and Japan acquired colonies, and so Japanese lawyers began to work in Taiwan, Korea and Manchuria, and even in Hong Kong.

To sum up, a key hypothesis of this thesis is that the modernisation of Japanese lawyers and legal system was enabled and supported by the continuity of legal practices from the Edo era, in particular by the continued activities of non-credentialed legal practitioners after the introduction of the qualification system for legal advocates in 1876. The dual system of continuity and discontinuity that emerged somehow managed to combine inherited Edo era practices and systems with the incoming Western legal concepts, theories and ideals. This was crucially important

in enabling the Westernisation of the legal system to succeed.

The dual system gradually disappeared in the third period (1900-1930s). At the same time, however, a binary regime composed of domestic legal system and practices and that of Japan's colonies and other foreign countries emerged. The relationship between empire and lawyer must be taken into account; although laws are basically domestic, lawyers freely move between states. Just as British lawyers expanded their zones of influence in the 19th century, including into Japan, Japanese lawyers now became active abroad, whether as the result of expansion in consular jurisdiction in another nation, colonial expansion or closer trade relations. As already mentioned in this section, British and American legal professionals had practiced in Japan until 1899. Along with the indigenisation of the legal system and the domestic limitation of legal qualifications, the number of foreign legal professionals appearing in Japanese courts fell from 1884 onwards. From that year they could not appear as lawyers anyway, and although they could still act as non-credentialed practitioners, in practise these numbers fell away too. The Japanese legal community had regained control over its domestic practices, but again in the early 1920s an international dimension came into effect. The difference this time however was that whereas in the 1870s-1890s legal practices in Japan were greatly influenced by Western imported systems, in the early twenties Japan played the role of exporter through the work of Japanese lawyers practising

in other countries. In retrospect it seems clear that the legal profession played a role in the creation of Japan's empire, in addition to the perhaps more obvious roles played by the military, politics, business and religion. Certainly for many ambitious young lawyers, who were struggling for various reasons to rise up the legal ladder within Japan, working abroad provided them with the means to progress their career.

Section 5: Aims of the Study

This research sets out to analyse the dynamic process and defining features of the creation of the legal profession in Japan. This process began with the introduction of the legal profession from the West, leading to the Westernisation of Japanese society and successive stages of encounter, assimilation and acculturation. Analysing these steps is a common means of understanding all aspects of social change in late 19th century Japan as the country evolved from a pre-modern into a modern society.

To begin with, we should ask why the Meiji government was attempting to transplant Western laws. Japanese historians, whether legal or otherwise, have seen it as necessary that Meiji Japan met certain Western criteria in order to be seen as 'civilised' and be treated as an equal partner by the West, and thus be in a better position to revise the unequal treaties Japan had been subjected to. The introduction of 'modern' legal systems was one of these key criteria. This Japanese historical research has generally concluded that the development of legal systems in Japan necessarily implied the enactment and enforcement of Western legal codes in a Westernised judicial system, a process referred to as the 'reception of law'.

However, for case-law countries such as the United Kingdom and the United States, the enforcement of the six main codes⁶⁴ was

⁶⁴ The main French legal codes of the Napoleonic era, such as the Criminal Code and Code of Civil Procedure, were collectively referred to as the 'Five Codes' or 'Six Codes', depending on which were included in the count.

surely not seen as a fundamental step along the road to 'civilisation', as middle classes of these countries no doubt saw themselves as civilised despite the absence of such codes in their legal systems. If so, what other criteria did these Western nations apply as a means of ascertaining whether Japan could be recognised as a civilised country? In other words how did the United Kingdom, for example, revise its assessment of Japan, a country it had previously viewed as 'half-savage'? The key element appears to have been the establishment of a 'modern' legal system, in particular a system for regulating the practices of lawyers and the application of law in trials. The British Parliament enacted the Foreign Jurisdiction Act 1843 in order to regulate the jurisdiction of British courts exercised in foreign countries pursuant to treaties and international agreements. In 1865, under powers conferred by the act, an Order in Council established Her Britannic Majesty's Supreme Consular Court for China and Japan, sitting at Shanghai. Her Britannic Majesty's Court for Japan was subsequently established in Yokohama in 1879 to hear cases against British subjects in Japan, and the court also heard appeals from British consular courts in Japan. These various Japan-based British courts dealt with a large volume of litigation in their spheres of jurisdiction until 1899, when the 'unequal' treaty between Britain and Japan was finally revised.⁶⁵

⁶⁵ Bruce H. McPherson, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Queensland Library, 2007), pp.432-433.

This thesis will seek to measure the influence of legal practice on the process of law making. The common belief held until now, which portrays foreign legal advisers and judicial officers as the codifiers of all laws in the Meiji period, must be interrogated. The true protagonists of this legislation were practicing lawyers from the late Edo era to the middle of Meiji era. Furthermore, the dichotomy between continental law and case law requires careful reconsideration in the context of the Japanese experience of the reception of law.

Secondly, the research focuses on why and how the Meiji government utilised both formal and informal legal practitioners during the process of Westernisation. This thesis will reveal the reasons why the Meiji government certified only a very small number of people as qualified lawyers and allowed many non-credentialed legal practitioners to appear in court, even up to Supreme Court level. An additional point of interest is the fact that the dispute resolution system developed in the Edo era was allowed to continue into the Meiji era. This thesis will examine why, and analyse how the legal profession came to utilise it as an alternative to the adjudication system.

In Chapter 2, the reception of Western laws and the legal profession itself is considered in more depth. As both Japanese and consular courts coexisted from the beginning of the Meiji era until 1899, the influence of the latter and its lawyers on Japanese legal modernisation must be examined. As much of the detail

regarding foreign legal advisers to the Japanese Government and the Ministry of Justice has already been well documented,⁶⁶ this chapter will focus on the role of British barristers who were living in foreign settlements in Japan from 1858 to 1899, working for their clients' banks, trading companies and business organisations. The recent work of Christopher Roberts has clarified the activities of the consular courts and their barristers, including court rulings.⁶⁷ His work, however, does not deal with barristers' activities in Japanese courts, as opposed to consular courts. These activities were the first encounter in the process of the reception of law and the foundation of a modern legal profession, an encounter that helped to establish new practices and drive Japanese professionalisation. Chapter 2 will therefore address how these foreign lawyers in Japan, especially those from Britain, influenced the establishment of Japanese legal practices as a profession.

Chapter 3 considers actual legal practice during the Westernisation process by analysing how the Japanese courts and Japan's judicial system resolved everyday minor cases, such as monetary claims or rental fee disputes, against the backdrop of the rapid changes being introduced to Japanese civil procedures.

⁶⁶ Noboru Umetani (ed.), *Oyatoi gaikokujin* (Tokyo: Kajima kenkyūkai, 1971); YUNESUKO (UNESCO) Higashi Ajia Kenkyū Sentā (ed.), *Shiryō oyatoi gaikokujin* (Tokyo: Shōgakukan, 1975); Tadashi Shimada et al (eds.), *Za · Yatoi* (Kyoto: Shibunkaku shuppan, 1987); Noboru Umetani, *Oyatoigaikokujin: Meiji Nihon no wakiyaku-tachi* (Tokyo: Kōdansya, 2007[1965]).

⁶⁷ Christopher Roberts, *The British Courts and Extra-territoriality in Japan, 1859-1899* (Leiden and Boston: Global Oriental, 2014).

As a result of private individuals being able to bring actions to court on their own, litigants filled courtrooms to overflowing. The chapter addresses the strategies introduced by the Ministry of Justice and the government in their attempts to resolve this pressure on local courts, and also examines how legal advocates assisted in the modernisation of the court system. Quantitative methods are employed to analyse changes and continuities in legal practices by examining Ministry of Justice statistics and digests, judicial precedents, text books, law journals and finally handbooks and instruction manuals written to assist parties filing suits.

The main purpose of Chapter 4 is to describe the formation of the legal education and qualification systems for lawyers in Japan and then to examine some of the key consequences of this process, for example the indigenisation (or nationalisation) of lawyers. This chapter deals with the acculturation stage of the legal profession as a whole. The study of western law and legal systems meant studying new and innovative ideas, and indeed we find many private study groups being formed by ambitious young people in the early Meiji era (1872 to 1880). In tackling issues of acculturation we should bear in mind that the leading agents of legal education in early Meiji Japan were highly diverse. They included men engaged in voluntary political movements, for example, as well as bureaucrats being trained as judges by the Meiji government itself. In a recent work Flaherty usefully details the

activities of legal and political study groups in the early Meiji period.⁶⁸ He draws on a wide variety of historical materials to explore insightfully these groups' activities, but he does not analyse the institutionalisation of the education system or its historical changes in any detail. In order to address this gap in the literature, this chapter will focus on the institutionalisation of the education system as well as on the examination system.

Chapter 5 clarifies the intent of the government and lawyers who sought to create a new legal structure for Japan as part of the modernisation of legal systems in 1890s, all based upon imported Western laws, practices and notions of 'the professional'. This chapter will focus upon the discussions held within the codes compilation committees around abolishing conciliation, admitting pro-se litigants (i.e. litigants who do not retain lawyers and represent themselves in court) and the provision of non-compulsory criminal defence counsel by attorneys; the chapter will also examine how the government sought to encourage older judges to retire.

Chapter 6 examines how the Japanese legal profession established and monopolised its occupational spheres of influence between the 1910s and 1930s. The exclusion of quasi-lawyers from the judicial courts is also discussed in order to clarify the

⁶⁸ Darryl E. Flaherty, *Public Law, Private Practice: Politics, Profit, and the Legal Profession in Nineteenth-Century Japan* (Cambridge, MA and London: Harvard University Asia Center, 2013).

process of professionalisation. Why and how did lawyers exclude non-credentialed legal practitioners? Larson has advanced a 'professional project' theory according to which every occupation must advance through the same stages of development in order to become a profession. This thesis demonstrates that this theory can be usefully applied to the Japanese legal profession. Larson has also analysed the importance of the monopolisation of occupational areas and the market,⁶⁹ and therefore Chapter 6 considers the process by which this occurred and the various features involved in the monopolisation of legal services by the newly established professional legal class in Japan. In addition, we will focus on the Empire and the lawyers working for their career and for their incomes. Finally, during the late 1930s and into the 1940s, when many of the fundamental functions of Japan's law and legal systems had been compromised or crushed by the nation's militarisation, the justice and fairness of the legal profession's qualification system remained in wartime as a beacon of hope, albeit a small one, to law school students or bar examination candidates who wanted to believe in the primacy of the legal system. Chapter 6 will therefore examine the stories of a number of political prisoners who managed to pass the bar examination after their release.

⁶⁹ Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (California: University of California Press, 1977); Richard L. Abel, 'Comparative Sociology of Legal Profession', in Richard L. Abel and Philip S.C. Lewis (eds.), *Lawyers in Society, Vol.3: Comparative Theories* (Beard Books, 2005[1989]), pp.106-110.

To sum up, this thesis sheds light on both the continuity of legal practices and practitioners from the Edo era into the Meiji era and on the reception of the legal profession in the 1870s and its professionalisation from the 1890s through to the 1930.

Chapter 2 First Encounters: The Influence of Foreign Lawyers

Section 1: Introduction

Section 2: Consular Courts and Japanese Courts

Section 3: Formalising Procedures in Japanese-Foreigner Lawsuits

Section 4: British Barristers in Meiji Japan

Section 1: Introduction

This chapter will discuss the contribution of foreign legal advocates to the establishment of the legal system and the legal profession in Japan. How did these foreign lawyers, especially those from Britain, influence the professionalisation of Japanese legal practice?

During the early Meiji era it would have been during the course of litigation in a consular court or in a Japanese civil interlocutory court (civil litigation submitted by foreigners to a Japanese court) that ordinary Japanese people, with no experience of travel abroad, first encountered Western legal advocates (or indeed Westerners of any description). The Amicable and Trade Treaties of 1858 (the so-called 'unequal treaties') between the five Western countries¹ and Japan had defined the settlements of the former within the latter (dominions, or *kyoryūchi*); the various consuls conducted consular trials within these settlements. As the British consular trials were regularly

¹ From 29 July 1858 to 9 October 1858, the United States, Holland, Britain, Russia and France (in that order) signed treaties with Japan.

opened to the public, Japanese people were able to observe the consular trials directly.² Moreover, Japanese people could submit petitions to the consular courts as plaintiffs and thus personally experience Western-style trials, and Japanese legal advocates could even act as legal representatives in the British consular courts until 1884.^{3 4}

Furthermore, as will be described in detail later, the Japanese civil courts also admitted the representatives of foreign

² Article 72: "The sittings of the Court for the hearing of causes shall ordinarily be public; but the Court may, for a reason to be specified by it on the minutes, hear any particular cause or matter in the presence only of the parties and their legal advisers and the officers of the Court."; in *Rules of Her Britannic Majesty's Supreme Court and other Courts in China and Japan. Framed under the Order of Her Britannic Majesty in Council of the 9th day of March 1865, by the Judge of Her Majesty's Supreme Court, and Approved by one of Her Majesty's Principal Secretaries of State. Dated the 4th of May 1865* (Lewis Hertslet (ed.), *A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations at Present Subsisting between Great Britain and Foreign Powers*, Vol.13 (London: Butterworths, 1877), p.246.

³ There was a discussion in 1884 between the British Court for Japan and the Japanese Ministry of Justice. Japanese advocate Toshizō Sawada (1853-1909) complained to the Ministry of Justice that since September 1883 the British Court for Japan seemed not to have been accepting qualified Japanese advocates to stand in court for their clients, whereas they had done previously. Sawada suggested therefore that Japanese courts should likewise not permit British barristers to act as court representatives. The Ministry of Justice ordered the President of Tokyo District Court to inquire of Consul Russell Robertson as to whether or not a qualified Japanese advocate could appear in the British Court for Japan as a lawyer. Consul Robertson replied that "Japanese advocates in common with the advocates of other nationalities, British excepted, are not allowed to subscribe to the roll of practitioners of this Court, and so generally to practise in this Court but the judge of Her Majesty's Court for Japan will adopt the same rule with regard to Japanese Barristers or advocates as applies to the law advocates of other nationalities" (No.2184; letter from Her Britannic Majesty's Consul Robertson, 18 April 1884, attached in a letter from Shihōshō to Gaimushō dated 5 May 1884). Robertson explained that exceptions to the rule could be made: "when in any particular case a Japanese plaintiff appearing before this Court is desirous of having his case conducted by Counsel, the judge will, in the particular case before him, admit a Japanese Barrister or advocate to practise on being satisfied that the case is one in which the services of Counsel may be considered necessary" (ibid). However it became clear following this letter that, at least officially, Japanese advocates were not permitted to appear in British courts, and that in practise they and other non-British advocates had not been able to appear in British courts as lawyers since September 1883.

⁴ Toshizō Sawada (1853-1909) had learned law and English since 1872 from George Hill, a legal adviser to the Ministry of Justice. He became a legal advocate (*daigen-nin*) in 1881 and entered Yale University in 1884, graduating in June 1887. He was appointed a vice president of the Association of Tokyo Legal Advocates.

lawyers when foreign plaintiffs utilised Japanese civil courts to file suits against Japanese merchants or debtors. This thesis focusses on the Japanese civil court cases although those Western lawyers utilised both Japanese courts and consular courts.

There were also various out-of-court legal practices in the Edo era, despite the absence of an established system of legal representation. The owners/proprietors and employees of a form of state-sanctioned accommodation known as 'suit-inns' (*kujiyado* or *gōyado*) provided housing for parties to disputes, but they also provided various forms of legal practice: along with drafting documents intended for magistrates' offices, they gave advice on the procedures to be found in magistrates' courts (*bugyōsho*) and escorted litigants to the courts. Suit-inn owners and employees were however unable to sue or plead in court on behalf of their clients or defendants respectively; legal advocacy in the modern Western sense was absent in the Edo era legal system. Thus, for ordinary Japanese people their first encounter with Western legal advocates in a consular court or in the interlocutory litigation of a Japanese court would not only have been their first interaction with foreigners, it would also have been their first encounter with any type of legal advocate acting as a legal representative.

In early Meiji Japan there was therefore the opportunity for direct contact with Western lawyers and their legal practices. This is a crucial point when considering the Westernisation of

legal practice and the construction of the legal profession in Japan from the point of view of the grass-roots reception of law, which in this thesis includes the local assimilation processes of Western legal systems and legal professions into the lives and communities of ordinary Japanese people through everyday legal practices, as well as the import and enforcement of foreign legal theories and codes by prominent lawyers. It is essential to understand that during the late Edo and early Meiji periods Japan was already further embedded within global, for which read Western, legal frameworks than we might perhaps appreciate.

Section 2 of this chapter will verify to what extent it was possible in the early Meiji era to have contact with Western lawyers and their legal practices in Japan. The statistics are instructive; by examining the number of consular courts and their caseloads, the interlocutory caseloads in the Japanese courts and the number of foreign lawyers in Japan from 1858 to 1898, we can get a good sense of the scale of the practices of Western lawyers.

The third section will examine one of the conflicts of jurisdiction between Japan and the West under the so-called unequal treaties, namely that some of the treaties did not admit Japanese jurisdiction over foreign plaintiffs submitting their suits to Japanese courts. The post-Meiji Restoration process by which Japanese civil courts assumed jurisdiction over cases between foreign plaintiffs and Japanese defendants and established interlocutory procedures profoundly influenced the concurrent

construction of the first litigation procedures for the civil courts governing intra-Japanese cases, in other words cases brought by Japanese plaintiffs against Japanese defendants. Section 3 will therefore seek to demonstrate how Japanese civil procedures in domestic courts were cemented by negotiations between the Japanese government and Western consulates concerning jurisdiction and its associated civil procedures. Interlocutory litigation in Japanese courts became one of the key settings for the reception of law, and was utilised by foreign legal advocates (especially British barristers) as well as by Japanese legal advocates and practitioners in order to resolve everyday disputes.

In Section 4, we will focus on the role of British barristers living in foreign settlements in Japan who were working for their clients' banks, trading companies and business organisations. In order to analyse their activities, especially their influence on the Japanese legal world, we must begin by identifying individual barristers. The section will examine in particular how two British barristers (William Kirkwood and Fredric Lowder), who had both lived in Japan for over thirty years, influenced Japanese legal advocates and ambitious young people in general during this period, for example Tōru Hoshi. For example, through observing Kirkwood in Japanese civil courts and noting how he cited English precedents from law reports, Japanese advocates learned how to present legal arguments in court. Lowder's contribution to Japanese legal professionalisation was

to demonstrate to ordinary Japanese people how a commoner such as himself could establish a legal career without strong social connections to the upper class. The Edo era was far from being meritocratic; there were no examinations enabling promotion to high office and the first qualification test was the legal advocates' examination, only introduced in 1876.⁵ For a person with ambition but without high social status or connections, Lowder showed how the legal profession was one means to become a member of an admired profession and climb the class ladder in Japan's rapidly modernising society. Through these investigations we will uncover how British barristers played crucial roles in constructing a 'modern' legal profession and in establishing Westernised legal practices in Japan.

⁵ This was an important difference between Japan on the one hand and China or Korea on the other; the latter two countries both had civil service examination systems.

Section 2: Consular Courts and Japanese Courts

From the final years of the Edo period through the early Meiji era and up until 17 July 1899, when the Amicable and Trade Treaties (the so-called "unequal treaties") were revised, Japan played reluctant host to the consular courts of various countries.⁶ These courts were opened in order that the non-Japanese parties to the various treaties could enjoy the advantages of extra-territorial rights.⁷ According to Kayaoğlu, 40 courts in total were active in Japan during the 1880s; the United States and Britain had six consular courts each in Japan,⁸ although strictly speaking one of these courts, Her Britannic Majesty's court for Japan (hereafter British Court for Japan), which was opened in 1879, was not a consular court but rather a professional court (consular courts

⁶ Although the 1899 revision resulted in the closure of the consular courts, the treaties themselves remained in place until 1911. Similar agreements concluded from 1858 to 1869 between Japan and other countries had slight differences in their names: Treaty of Amity and Trade, Treaty of Peace, Amity and Commerce, Treaty of Peace, Friendship and Commerce and the like.

According to Turan Kayaoğlu (*Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010), pp.66-67), following the signing of the first unequal treaties with the United States in 1858, Japan concluded similar agreements with Holland, Britain, Russia, France, Portugal, Germany, Switzerland, Belgium, Italy, Sweden-Norway, Spain, Austria-Hungary, Hawaii, Qing China and Peru. Interestingly, with the exception of Qing China, whenever a new agreement was signed with a country the conditions stipulated in that document would be applied to all countries that had previously signed such a treaty with Japan (assuming that the conditions were more favourable to the non-Japanese party than those in the earlier documents). See also Seirō Kawasaki, *Bakumatsu no chūnichi gaikōkan, ryōjikan* (Tokyo: Yūshōdō Shuppan, 1988); Seirō Kawasaki, "Meiji jidai no Tokyo ni atta gaikoku kōkan", *Gaimushō Chōsa geppō* Vol.2010-2 (2010), pp.1-19.

⁷ The treaties were not entirely one-sided. Shogunate officers did not want Westerners travelling freely around the country, and the establishment of the settlements enabled Japan to limit the degree to which foreigners mixed with local people. Recent research has argued that Shogunate officers saw ceding extra-territorial rights and the establishment of consular courts as the price to be paid for limiting further foreign incursions into Japan. It was only in the 1880s, when trade really began to pick up, that the Japanese authorities (Meiji government) realised the problems created by extra-territoriality.

⁸ Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010), pp.66-67.

are not generally seen as 'professional courts').⁹

The treaties of trade and friendship between Japan and various Western countries stipulated that, regarding cases in Japan, criminal jurisdiction would be exercised in accordance with the law of the country where the accused was domiciled, irrespective of the site of the alleged crime. For example, a British subject (national) who committed murder in Japan would be judged by the British consular court in Japan, in full conformity with British law.¹⁰ For civil matters a Japanese subject could sue a foreign subject in the latter's consular court, but not in a Japanese civil court; Japanese people were obliged to take cases to the consular court of the defendant's mother country, even in minor civil cases. Right up until the revision of the unequal treaties in 1899, Japanese plaintiffs and legal advocates or practitioners could use the consular courts, while foreign plaintiffs and foreign advocates could bring cases to the Japanese

⁹ For the consular courts' dispute resolutions, see Richard T. Chang, *The Justice of the Western Consular Courts in Nineteenth-Century Japan* (Westport and London: Greenwich Press, 1984); Christopher Roberts, *The British Courts and Extra-territoriality in Japan, 1859-1899* (Leiden and Boston: Global Oriental, 2014). See also J.E. Hoare, *Japan's Treaty Ports and Foreign Settlements, 1858-1899* (Folkestone: Japan Library, 1994).

¹⁰ Article V of the Treaty of Peace, Friendship and Commerce between Great Britain and Japan, signed at Yedo in Japanese, English and Dutch, 26 August 1858 (18th day, 7th month, 5th year of Ansei) and ratified at Yedo 11 July 1859 (12th day, 6th month, 6th year of Ansei), stipulated as follows:

"Japanese subjects, who may be guilty of any criminal act towards British subjects, shall be arrested and punished by the Japanese authorities according to the laws of Japan. British subjects who commit any crime against Japanese subjects, or the subjects or citizens of any other country, shall be tried and punished by the Consul, or other public functionary, authorized thereto, according to the laws of Great Britain. Justice shall be equitably and impartially administered on both sides."

The fifth article of the treaty stipulated that in crimes involving British and Japanese subjects the offender would be arrested and punished by the defendant's authorities according to the laws of the defendants' country. This was a typical clause of an "unequal" treaty, which guaranteed extra-territorial jurisdiction for the Western countries.

civil courts.

2-1 Japanese Criminal Court

Although in this chapter we will mainly discuss interlocutory litigation practices in the Japanese civil courts, we should also briefly examine criminal advocacy. An 1876 criminal case (discussed below) shows us how interlocutory litigation in such cases held in Japanese courts that involved foreigners, whether as litigants or legal professionals, influenced some aspects of Japanese judicial modernisation. For example, when foreigners accused Japanese suspects in a Japanese court they employed legal advocates, and so through such cases the Ministry of Justice came to realise the importance of the defence counsel role.¹¹ Japanese defendants were not allowed to utilise a defence counsel until 7 June 1876, when the government (Grand Council of State) declared that Japanese defendants in criminal cases involving foreigners could do so precisely because foreigners were employing lawyers when they took Japanese people to court.¹²

The Ministry of Justice asked the Grand Council of State for permission for Japanese defendants to employ criminal advocates, arguing that although under traditional Shogunate legal practice criminal defence had not been accepted in magistrates'

¹¹ Before the enforcement of the 1880 Criminal Procedure Code in 1882, foreigners utilised legal advocates in order to sue the accused.

¹² No.88, 7 June 1876, *Daigo ruiten Dai dai 2 hen*, Vol.347 (*Meiji 4-nen 8-gatsu yori Meiji 10-nen 12-gatsu ni itaru*), "Permission for utilising a defence counsel in criminal cases related to foreigners".

courts, this was not necessarily a prohibition. The Ministry noted that in criminal cases involving a foreigner as plaintiff and a Japanese as defendant, the foreigner would typically employ a counsel while the Japanese was barred from doing the same. This meant that the defendant was not endowed with the same rights as the plaintiff, and that Japanese nationals were not being adequately protected.¹³ The Ministry of Justice's request for permission to employ a defence counsel was based on a report (20 May 1876) from Tokyo District Court judicial officer (*kenji*, literally means prosecutor) Ataru Hayakawa, acting for the state. According to the report a group of people including a Mrs. Orlando, an American woman who ran a hotel in the foreign settlement in Tsukiji (Tokyo), had, on 1 May 1876, become angry with and struck a greengrocer named Denzo Shirai and his wife Saki because Shirai had gone to Orlando's hotel to ask for payment for some vegetables. A fight broke out which resulted in Shirai being seriously injured and his wife being hospitalised with a broken rib and arm. Orlando and her counsel then went to Tokyo District Court, where they accused Shirai and asked for the investigation and hearing to be speeded up.¹⁴ Hatakawa noted how unfair this seemed, as Mrs Shirai was confined to bed by her injuries and as the couple were not allowed to employ a criminal advocate to represent them as defendants.

¹³ Ibid.

¹⁴ Ibid.

Hayakawa argued that Japanese women and children, as well as poor public speakers often risked losing cases even if they were innocent due to the lack of a defence counsel. In this particular case, not only because of the impossibility of key individuals appearing in court but also in order to protect Japanese nationals' rights, Hayakawa asked the Minister of Justice for permission to utilise criminal counsel for Japanese defendants as soon as possible.¹⁵

On 26 June of the same year the Ministry of Justice again asked the Grand Council of State to permit criminal defence counsel. This was in relation to a case in which a Dutch trading company accused a Japanese merchant, Mitani Sankuro, of fraud. The council's reply was that criminal defence counsel for Japanese defendants in cases involving foreign plaintiffs had been permitted since 6 June,¹⁶ although there is no evidence of this general applicability ever having been formally announced. Nevertheless, it was now at least clear that Japanese people sued in court by non-Japanese plaintiffs could utilise counsel in such criminal cases.

2-2 Civil Courts

In civil interlocutory cases the utilisation of legal advocates was permitted in Japanese courts. This served as an opportunity

¹⁵ Ibid.

¹⁶ Ibid.

for Japanese legal advocates/practitioners and judicial officers to meet foreign lawyers and to apply their new knowledge to their management of cases in the Japanese civil courts. It's useful to examine how many Japanese used the consular courts, and how cases were processed and resolved there. Table 2-1-1 represents the civil caseloads submitted by Japanese plaintiffs into the various consular courts.

[Table 2-1-1] Civil cases brought by Japanese plaintiffs in consular courts (by consular court; 1875-1898)¹⁷

¹⁷ Tables 2-1-1 and Table 2-1-2 were compiled by the author from Shihōshō (ed.), *Shihōshō minji tōkei nenpō* (The Ministry of Justice Civil Judicial Statistics), 1875-1898. The Ministry of Justice collated statistics from 1875 to 1899; however, as the consular courts were abolished on 19 July 1899, the data from 1899 do not represent a full calendar year and so have not been included in the table. Furthermore, there is no data available for 1876 and 1877.

Table 2-1-1 Civil cases brought by Japanese plaintiffs in consular courts (by consular court; 1875-1898)									
	Britain	Qing China	America	Germany	France	Portugal	Russia	Others	Japanese plaintiffs' cases
1875	59	0	31	23	17	7	0	18	155
1876	--	--	--	--	--	--	--	--	--
1877	--	--	--	--	--	--	--	--	--
1878	55	13	21	15	9	3	3	13	132
1879	63	20	32	15	11	4	1	16	162
1880	77		43	18	14	6	0	14	209
1881	43	37	44	18	12	1	1	12	168
1882	51	68	30	9	17	5	0	9	189
1883	52	99	26	21	16	12	8	14	248
1884	72	84	28	21	10	14	7	23	259
1885	62	41	24	21	12	12	5	15	192
1886	53	50	21	15	9	9	4	16	177
1887	41	44	20	8	18	3	5	14	153
1888	51	42	20	9	11	4	4	9	150
1889	58	43	20	20	1	6	4	10	162
1890	70	59	42	21	9	6	4	10	221
1891	107	58	38	19	13	4	6	19	264
1892	81	64	39	22	10	9	6	11	242
1893	73	44	25	18	22	1	6	15	204
1894	50	27	26	5	24	1	7	8	148
1895	44	8	35	10	14	1	6	13	131
1896	63	--	33	10	6	1	7	11	131
1897	70	--	25	15	6	1	5	5	127
1898	58	--	33	16	11	1	5	8	132
Total Number of Case	1,353	801	656	349	272	111	94	283	3,956
Total Number of New Case	1,239	825	604	311	246	101	91	283	3,700
Note) 'Others' consists of The Netherlands, Italy, Denmark, Switzerland, Spain, Austria, Belgium, Sweden, Norway and Hawaii, in order of case number.									
Note) The final total numbers for 'Japanese Plaintiffs' Cases' includes cases which were carried over from one year to the next, and as such some cases will be double-counted (or more).									

Ignoring the two years for which data could not be found (1876-77), Table 2-1-1 indicates that from 1875 to 1898 Japanese plaintiffs brought an average of 170 cases per year to the consular courts. The table shows that the number of cases brought to British consular courts by Japanese parties far exceeded that of any other country's courts, accounting for almost a third of the total number of cases over the period (1,239 cases out of 3,700). Together with the Qing China cases, they accounted for over half the total; the American consulate and German and French legations

also had significant caseloads.¹⁸

Table 2-1-2 re-arranges the 3,956 cases brought by Japanese plaintiffs in consular courts throughout the unequal treaty period (1875-1898) by the result of the litigation, as opposed to by court nationality; these results have been released by The Ministry of Justice since 1879.

¹⁸ The treaty between Japan and Qing China was an equal treaty signed in Tianjin in 1871. However, the contents of the treaty were basically copied from the contents of the unequal treaties that the two countries had been pressed into accepting by the European powers and the United States. In the treaty Japan and Qing China recognised each other's consular jurisdiction. This treaty was revoked in 1895 after the Sino-Japanese War.

[Table 2-1-2] Civil cases brought by Japanese plaintiffs in consular courts (by result; 1875-1898)

【Table 2-1-2】 Civil cases brought by Japanese plaintiffs in consular courts (by result; 1875-1898)									
	Withdrawal	Settlement	Dismissal	Judgment	[Plaintiff won the case]	[Plaintiff lost the case]	Total: Processed Cases	Pending Total	Japanese Plaintiffs' Cases
1875	--	--	--	--	--	--	99	56	155
1876	--	--	--	--	--	--	--	--	--
1877	--	--	--	--	--	--	--	--	--
1878	--	--	--	--	--	--	--	--	132
1879	11	17	2	44	38	6	74	88	162
1880	45	28	6	58	49	9	137	72	209
1881	36	10	9	52	42	10	107	61	168
1882	17	18	12	47	40	7	94	95	189
1883	24	23	18	73	53	20	138	110	248
1884	16	66	12	63	50	13	157	102	259
1885	11	28	14	63	52	11	116	76	192
1886	11	24	1	76	53	23	112	65	177
1887	3	6	16	75	57	18	100	53	153
1888	18	14	3	52	44	8	87	63	150
1889	9	21	4	61	49	12	95	67	162
1890	28	25	6	74	64	10	133	88	221
1891	11	34	31	96	72	24	172	92	264
1892	53	29	11	91	66	25	184	58	242
1893	32	16	15	89	64	25	152	52	204
1894	21	20	10	53	32	21	104	44	148
1895	27	29	7	34	23	11	97	34	131
1896	21	25	7	47	30	17	100	31	131
1897	21	21	13	37	31	6	92	35	127
1898	20	14	8	41	30	11	83	49	132
Total Number	435	468	205	1,226	939	287	2,433	1,391	3,956
Note) The final total numbers for 'Japanese Plaintiffs' Cases' includes cases which were carried over from one year to the next, and as such some cases will be double-counted (or more).									

The first thing that can be seen from this table is that the percentage of cases ending in judgments is high, at slightly over 50% of all processed cases (1,226 out of 2,433). This is a departure from earlier court practices, as almost all disputes in the Edo and early Meiji periods had been resolved through settlement in and out of court, without a ruling being issued. Moreover, Table 2-1-2 also indicates the balance of the rulings; Japanese plaintiffs were overwhelmingly successful in these cases. Although there are variations by year, over the whole period 76.6% of all judgements were in favour of the plaintiff, i.e. the

Japanese party. In each of the first four years for which we have data, namely 1879 to 1882, Japanese plaintiffs actually won over 80% of their cases. Although the success rate then declines, even at its lowest (1894) it is still over 60%. To sum up, Table 2-1-2 suggests that the Japanese plaintiffs in consular trials held in Japan were not treated unfavourably or unfairly, at least in civil actions. A variety of factors should be considered for their high rate of success; for example, in the early years of the consular trials in particular, Japanese plaintiffs did not bring suits unless they were fairly certain they could win, and plaintiffs carefully prepared their documentary evidence and other material. As trials in the consular courts were conducted in the language of that court's home country, it must have taken them a lot of effort and expense. This involvement in consular trials greatly increased Japanese understanding of Western legal systems, supported the expansion of the legal profession in Japan and enabled such imported practices to further penetrate into Japan's legal frameworks and grassroots communities.

Moreover, foreigners, foreign companies and trading firms could sue in the Japanese civil courts as plaintiffs.¹⁹ As the Japanese government allowed foreigners and foreign lawyers to

¹⁹ There has been very little research conducted into interlocutory litigation during the early Meiji era; Eiichi Takikawa, "Tokyo kaishijō saibansho no secchi to sono hanketsu rei", in *Nihon saiban seido shi ronkō* (Tokyo: Shinzansha, 1991) and Tomoko Morita, "Meiji-ki ni okeru gaikokujin kankei saiban (1): Tōkei bunseki wo chūshin ni", *Chūbu daigaku jinbungakubu kenkyū ronshū* No.27 (2012), pp.112-102, are both exceptional in this regard.

institute legal proceedings in the civil courts,²⁰ foreign-trained lawyers (mainly British barristers) could stand in the Japanese courts. It is important for research on legal professionalisation and on legal reception to investigate this interlocutory litigation during the early Meiji era. It should be pointed out that although most of the foreign lawyers were British, the plaintiffs themselves were from a wide range of countries as well as from Britain; over the whole period, plaintiffs from Qing China were the most numerous. This data is presented below in Table 2-2-1.

[Table 2-2-1] Civil cases brought by foreign plaintiffs in Japanese courts (by nationality; 1875-1898)²¹

²⁰ As we will see in Section 3 of this chapter, Notification No.205 (dajōkan fukoku) of 13 June 1873, Civil Procedure for Foreigners (i.e. Westerners) (gaikokujin soshō kisoku) was cancelled on 19 June of the same year because of criticism from Western envoys. In reality, however, interlocutory litigation was held in Japanese courts; see Table 2-2-1.

²¹ As with Tables 2-1-1 and 2-1-2, the data in Table 2-2-1 was compiled by the author from Shihōshō (ed.), *Shihōshō minji tōkei nenpō* (The Ministry of Justice Civil Judicial Statistics), 1875-1898.

【Table 2-2-1】 Civil cases brought by foreign plaintiffs in Japanese courts (by nationality; 1875-1898)									
	Qing China	Britain	Germany	America	France	Switzer-land	Denmark	Others	Foreign Plaintiffs 'Cases
1875	--	--	--	--	--	--	--	--	21
1876	--	--	--	--	--	--	--	--	407
1877	--	--	--	--	--	--	--	--	305
1878	43	63	13	18	16	5	20	18	196
1879	40	37	15	8	7	5	11	5	128
1880	24	31	15	10	12	5	8	12	117
1881	16	16	22	4	10	5	4	7	84
1882	30	24	22	6	16	6	1	5	110
1883	47	25	35	11	1	6	2	6	133
1884	41	29	41	13	9	1	0	6	140
1885	26	29	34	7	13	5	0	3	117
1886	27	24	21	6	7	8	2	3	98
1887	37	13	12	4	6	4	1	1	78
1888	27	31	8	8	11	5	0	3	93
1889	27	23	10	7	19	8	0	1	95
1890	24	28	9	6	9	0	0	2	78
1891	20	48	25	7	8	2	1	4	115
1892	24	19	11	7	5	0	0	6	72
1893	28	25	10	10	3	1	0	11	88
1894	34	7	8	8	3	0	0	10	70
1895	21	11	10	8	1	0	0	10	61
1896	27	10	6	7	2	0	0	8	60
1897	25	13	4	2	3	1	0	12	60
1898	36	25	17	9	5	0	0	6	98
Total Number	624	531	348	166	166	67	50	139	2,824
Note) 'Others' consists of Portugal, Russia, the Netherlands, Italy, Austria, Hungary, Korea, Belgium, Spain, Romania, Greece, Prussia, Sweden=Norway, British India and Turkey, in order of case number.									

Table 2-2-1 shows that a large proportion of the total litigation was submitted to Japanese courts by parties from Qing China, Britain and Germany. The total number of British cases was second only to Qing China and was much greater than that of other Western countries, especially during the first three years for which we have a breakdown by country (1878-80); we can reasonably assume the breakdown was similar in the three years prior to this (1875-77), which were the first years of interlocutory litigation being filed in Japanese courts. One of the reasons for presenting this data here is to show just how great the British presence was

in various aspects of the developing Japanese legal system, and by extension to demonstrate the logic behind this thesis' assumption that this prominence resulted in British barristers influencing court practice more than, say, American, German or French lawyers. Notably, British barristers also dealt with cases in which plaintiffs from other countries sought to submit petitions into Japanese courts.

Although the total number of interlocutory cases (2,824 cases) made by foreign plaintiffs in Japanese courts was lower than that made by Japanese plaintiffs in the consular courts, it is clear that the two court systems mutually influenced each other and played joint roles in constructing a Western-based legal system.

Section 3: Formalising Procedures in Japanese-Foreigner Lawsuits

In this section we will examine the discussions between Japan and the West (mainly British legation) regarding whether the Japanese government had the authority to decide court procedures in cases where a foreigner filed a case in a Japanese court and how the Ministry of Justice coped with the jurisdictional issue of whether or not the Japanese government could regulate interlocutory litigation. From the very beginning of the Meiji era, following the Restoration, the enactment of civil procedures in Japanese courts involved the problem of how to enable foreigners to use Japanese courts.

The process of seeking to enact civil procedure rules for foreigners utilising Japanese courts (for interlocutory litigation) and the creation by the Ministry of Justice of Japan's general court procedures actually developed in tandem, with some degree of influence each way. The first of these two sets of rules, the Civil Procedure Rules for Foreigners in Japanese courts, was enacted on 13 June 1873 (Notification No.205, Dajōkan fukoku) but enforcement ceased just six days later, on 19 June 1873, after British Envoy Extraordinary and Minister Plenipotentiary (hereafter, Envoy) Sir Harry Parkes objected to the Japanese government's moves to impose civil procedure rules upon British subjects. The second set of rules mentioned above, the Japanese Court Rules and Procedures and Appendix Format, which were set out in Notification No.247 of 17 July 1873 (Dajōkan Fukoku;

Sotōbunrei 訴答文例) and were the first such rules to be properly enforced in Meiji Japan (and were utilised until 1890), included a number of measures regarding foreign participation in the court system. However, these particular provisions were also deleted by the government on 10 October 1873 (Notification No.339, Dajōkan Fukoku), just three months after the Court Rules and Procedures were enforced. Despite this, when in 1877 the Ministry of Justice stipulated appeal procedure rules they again negotiated with the British legation and succeeded in translating the rules into English for the benefit of British residents. This section focuses on the contacts and negotiations the Ministry of Justice had with the West, especially with Britain, during the stipulation of court rules and procedures, contacts which were made due to the utilisation of Japanese civil courts by foreign residents.

3-1 Two Types of Unequal Treaty

From around 1870 the Meiji government actively sought to expand its jurisdiction to be able to accept civil lawsuits brought by Western plaintiffs in Japanese courts. The government opened a foreign affairs and customs office at the foreign settlement in Tokyo (Tokyo Kaishi; formerly, Tokyo Unjōsho) on 1 January 1869 (19 November 1868 according to the lunar calendar), which dealt with land, customs and tax matters but also disputes and even lawsuits. From this point until April 1871, Tokyo Prefecture was given jurisdiction in any dispute resolution where the plaintiff

was the foreign party and the defendant was Japanese, but crucially did not have jurisdiction in cases where the reverse was true.

Strictly speaking, there were two types of unequal treaty made concerning Japanese civil jurisdiction. On the one hand the Amicable and Trade Treaties made with Prussia (inherited by the German Empire from 1871) and with Switzerland approved Japanese jurisdiction over the Japanese civil courts in cases where the foreign plaintiffs directly submitted their petitions to the Japanese courts. On the other hand, the treaties between Japan and Great Britain, France, Belgium and other countries denied Japanese civil jurisdiction outright.²² British subjects were actually not allowed to submit petitions directly to Japanese courts, since British consular courts resolved all disputes between Japanese and British nationals, with the help of the Japanese authorities. The Treaty of Peace, Friendship and Commerce between Great Britain and Japan stipulated the active involvement of the British Consulate in such civil cases:²³

²² For the Japanese courts under the unequal treaties, see Hideaki Katō, "Ryōji saiban no kenkyū: Nihon ni okeru (1)(2)", *Nagoya daigaku hōsei ronshū* No.84 (1980), pp.301-361 / No.86(1980), pp.93-153; Hitoshi Iwamura, "Ryōji saiban kiroku no naka no minji jiken: Chū Kobe Eikoku ryōjikan no Meiji shonen no saiban kiroku kara", *Osaka keizai hōka daigaku hōgaku ronshū*, No.33 (1994), pp.47-116; Tomoko Morita, *Kaikoku to chigai hōken: Ryōji saiban seido no un'yō to Maria Rusu-gō jiken* (Tokyo: Yoshikawa kōbunkan, 2005). See also Christopher Roberts, *The British Courts and Extra-territoriality in Japan, 1859-1899* (Leiden and Boston: Global Oriental, 2014).

²³ The treaty was signed at Yedo, in Japanese, English and Dutch, 26 August 1858 (18th day, 7th month, 5th year of Ansei); ratifications were exchanged at Yedo, 11 July 1859 (12th day, 6th month, 6th year of Ansei). Lewis Hertslet (ed.), *A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations at Present Subsisting between Great Britain and Foreign Powers: And of the Laws, Decrees, and Orders in Council, Concerning the Same; so far as They relate to Commerce and Navigation, the Slave Trade, and Post-Office Communications, Copyright, &c.; and to the Privileges and Interests of the Subjects of the High*

Article VI

A British subject having reasons to complain of a Japanese must proceed to the Consulate and state his grievance.

The Consul will inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Japanese have reason to complain of a British subject, the Consul shall no less listen to his complaint, and endeavour to settle it in a friendly manner. If disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of the Japanese authorities, that they may together examine into the merits of the case, and decide it equitably.

Although the above article did not make civil jurisdiction clear in cases concerning British and Japanese subjects, it did deny the British party the right to submit their petition directly to the Japanese civil courts. According to Article Seven, however, petitions regarding financial claims or fraudulent absconding could be submitted to the Japanese authorities.²⁴ The Treaty of Peace, Amity and Commerce between the United States of America

Contracting Parties, Vol.11 (London: Butterworths, 1864), p.398.

²⁴ Yasuyuki Shimizu, *Kurofune raikō: Nihongo ga ugoku* (Tokyo: Iwanami shoten, 2013), p.178. Article VII ran as follows: "Should any Japanese subject fail to discharge debts incurred to a British subject, or should he fraudulently abscond, the Japanese authorities will do their utmost to bring him to justice, and to enforce recovery of the debts; and should any British subject fraudulently abscond, or fail to discharge debts incurred by him to Japanese subjects, the British authorities will, in like manner, do their utmost to bring him to justice, and to enforce recovery of the debts."

and the Empire of Japan has a similar civil jurisdiction article to that found in the treaty between Britain and Japan.²⁵

By contrast, the Treaty of Peace, Friendship, and Commerce between Prussia and Japan had clear jurisdiction concerning civil cases.²⁶ For cases occurring in Japan, the fifth article of the treaty stipulated that when a Prussian citizen had a complaint or grievance against a Japanese subject or when a Japanese citizen had a complaint or grievance against a Prussian subject, the case shall be decided by the authorities of the defendant's country.²⁷ According to this article the Japanese authorities accepted claims from Prussians and had jurisdiction over such cases. This provision shows that Prussian subjects and native Japanese people were treated as equal defendants in civil cases in Japan, and that

²⁵ Signed at Yedo, in Japanese, English and Dutch, 29 July 1858 (19th day of 6th month, 5th year of Ansei); ratification exchanged at Washington, 22 May 1860 (3rd day of 4th month, 1st year of Man'yō). In the sixth article it was recorded that "the Consular Courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens, and the Japanese Courts shall in like manner be open to American citizens, for the recovery of their just claims against Japanese. All claims for forfeitures or penalties for violations of this treaty, or of the articles regulating trade, which are appended hereunto, shall be sued for in the consular courts and all recoveries shall be delivered to the Japanese authorities."

²⁶ Gaimushō Jōyakyoku (ed.), *Kyū jōyaku isan* (Tokyo: Gaimushō jōyakyoku, 1931), pp.967-968.

²⁷ Ibid. Article V of the treaty between Prussia and Japan ran as follows: "All disputes in regard to rights, whether of property or of person, arising between Prussians residing in Japan, shall be submitted to the constituted Prussian authorities in Japan, for decision.

If a Prussian citizen has a complaint or grievance against a Japanese subject, the case shall be decided by the Japanese authorities.

If, on the contrary, a Japanese has a complaint or grievance against a Prussian, the case shall be decided by the Prussian authority.

Should a Japanese subject fail to discharge debts incurred to a Prussian, or should he fraudulently abscond, the competent Japanese authorities will do their utmost to bring him to justice, and to enforce payment of the debts; and, should a Prussian fraudulently abscond or fail to discharge debts incurred by him to a Japanese subject, the Prussian authorities will do their utmost to bring him to justice, and to enforce payment of the debts.

Neither the Prussian nor the Japanese authorities shall be held responsible for the payment of any debts contracted by Prussian or Japanese subjects."

jurisdiction in such cases rested with the country of the defendant.

From the differences between the provisions agreed between Japan and the various Western nations, for example Prussia/Germany, Great Britain and the United States, arose the question for the Japanese authorities, as well as for British consulates, as to whether or not British citizens could file a complaint against Japanese citizens at a Japanese court without permission from the British consuls.²⁸ Negotiations through the 1870s between the foreign consulates and the Ministry of Foreign Affairs resulted in the establishment of a method of dispute resolution. To use Auslin's terminology, these discussions between Japan and the West can be viewed as 'negotiating as a form of resistance' or as 'practical resistance',²⁹ in other words as means of coping with the so-called unequal treaties and as ways to influence how they were practically employed in actual court practices.

It was decided that when Tokyo Prefecture (as well as other open port prefectures³⁰) accepted a petition or a claim submitted by a Japanese person that named a foreign person as defendant,

²⁸ Hideaki Katō, "Ryōji saiban no kenkyū: Nihon ni okeru (1)", *Nagoya daigaku hōsei ronshū* No.84 (1980), p.331. No.49 Naigaikokujin kanshōsoshō shobungata, *Dajōruiten sōkō Keiō 3-nen yori Meiji 4-nen shichigastu ni itaru (177 kan) Soshō Minjisaibansho* (Kokuritsu kōbunshokan 2A-24-9-207).

²⁹ Michael R. Auslin, *Negotiating with Imperialism: The Unequal Treaties and the Culture of Japanese Diplomacy* (Harvard University Press, 2006).

³⁰ Open ports (or harbours) were those ports in Qing China, Korea and Japan which, by treaty agreement, Western countries were allowed to use. In 1854 Japan signed a treaty with the United States that included opening ports in Hakodate (now Hokkaido prefecture) and Shimoda (now Shizuoka prefecture), and after the treaties of 1858 Japan promised to open five ports (Hakodate, Kanagawa (Yokohama), Niigata, Hyogo (Kobe) and Nagasaki) in further treaties with Western countries.

they would ask the Ministry of Foreign Affairs to submit the petition to the foreign party's consulate; similarly, when foreign plaintiffs submitted petitions to their consulates against Japanese defendants, Tokyo Prefecture would accept these via the Japanese Ministry of Foreign Affairs.

3-2 Negotiation concerning the Japanese Court' Jurisdiction

From March 1872 the Ministry of Justice took over jurisdiction of lawsuits between foreigners and Japanese people from the Ministry of Foreign Affairs, because the Meiji government was seeking to separate the powers of administration, legislation and judicature; it renamed the Tokyo Prefecture judicial branch the Tokyo Open Market Court (Tokyo Kaishi Saibansho).³¹ Nevertheless, the Japanese judicature remained part of the administration for a few more years, just as it had been since the 1871 establishment of the Ministry of Justice; local government dealt with both lawsuits and local administration concurrently and did not relinquish its power over the judicature.³² Finally however, in 1875, lawsuit jurisdiction of Japan was transferred once again, this time to Tokyo Court.

The Ministry of Justice seems to have decided to be more proactive following complaints from foreign residents and companies. For example, from June 1873 the Ministry started to

³¹ Notification No. 33, 3 February 1872, Dajōkan Fukoku.

³² See Eiichi Takikawa, "Tokyo kaishijō saibansho no secchi to sono hanketsu rei", in *Nihon saiban seido shi ronkō* (Tokyo: Shinzansya, 1991), pp.179-210.

accept suits for monetary claims without evidence.³³ This differed from Japanese domestic practice, which since the Edo era had demanded written evidence for such claims. Petitions without documentary evidence were not accepted from Japanese litigants, because such submissions were regulated by Article 92 of the Act for Judicial Organization and Procedure (Shihōshokumu teisei Dajōkan Tasshi, Unnumbered of 1872).³⁴ However, the Ministry of Justice made an exception to this rule in order to be able to accept financial claims from Western residents.

Although the Japanese Court Rules and Procedures set out in Notification No.247 of 17 July 1873 (Dajōkan Fukoku; Sotōbunrei 訴答文例) were the first such rules to be promulgated in Meiji Japan, the Ministry of Justice had previously attempted to introduce similar measures specifically for Westerners (Gaikokujin soshō kisoku). These rules were drafted in June 1872 and promulgated in June 1873, but their enforcement was suspended just six days later. One reason for this suspension was the disapproval of British Envoy Sir Harry Parkes. Parkes opposed the measures on the grounds that the enforcement of these court rules and procedures for foreigners (for which read Westerners) would mean that the Japanese government would acquire sovereignty over foreign residents in Japan.³⁵ The strong opposition of Parkes was based on

³³ *Dajōruiten Dai nihen Meiji 4-nen 8-gatsu yori Meiji 10-nen 12-gatsu ni itaru* (Vol.339), *Soshō 3, Minji saibansho 3* (Kokuritsu kōbunshokan 2A-562), No.33.

³⁴ Masahiro Suzuki, *Kindai minji soshō hō shi: Nihon* (Tokyo: Yūhikaku, 2004), pp.1-34.

³⁵ Letter from Parkes to Minister of Foreign Affairs Soejima, 5 August 1873, in *Meiji gonen yori nananen ni itaru gaikokujin soshōkisoku seiteikken* (Gaimushō

his contention that the treaty between Britain and Japan had not clearly authorised Japanese jurisdiction over civil cases submitted by British citizens to the Japanese courts; indeed, this was the difference between the British and Prussian/German treaties, as the latter approved Japanese jurisdiction over such cases. From this point on expanding and regaining total jurisdictional control in order to force a revision of the unequal treaties became one of the Japanese government's key aims.

As the Japanese civil court system evolved through the 1870s, the Japanese government and British consulate increasingly became aware of another issue regarding the courts and their civil procedures. The treaty between the two nations stipulated that British litigants could not submit their petitions directly to the Japanese civil courts; they were obliged to channel their cases via the British consulates and/or the consular court system. However, in practice British barristers were actually going direct to Japanese civil courts with their petitions, and it was clear that a mechanism was needed to manage civil cases in the Japanese courts submitted by these British residents, despite the treaty not recognising such submissions. The Japanese government resolved this problem by reaching an agreement with the British consulate on civil proceedings in Japanese courts, which resulted in the British government delivering an edict ruling that British subjects could utilise the Japanese civil courts for civil

gaikōshiryōkan shozō 4mon 1rui 1kō 3gō).

proceedings. It's worth noting however that despite this formalisation of the civil proceedings, Japanese courts had actually been dealing with cases submitted by foreign residents and their barristers, known as interlocutory litigation (*naigai kōshō soshō*), before the enforcement of the British edict.

The Ministry of Justice began to draft The Civil Procedure Rules for Foreigners on 23 June 1872. After spending a year drafting these measures they were publicly promulgated on 13 June 1873, but their enforcement was postponed and in effect cancelled following British intervention. In a letter dated 5 August 1873 from the British Consulate to the Japanese Minister of Foreign Affairs, Parkes referred to four court rules and procedures for foreign residents recently written by Nicholas John Hannen (1842-1900), Justice of the Consulate.³⁶ The letter made it clear that the British Consulate would not approve Japanese civil jurisdiction over British residents, insisting instead that some form of mixed jurisdiction should be established.

The situation was further complicated by the decision of the German consulate, which had previously agreed with the enforcement of the court rules and procedures, to change their view and insist that the 6th clause of the Treaty of Peace, Friendship and Commerce between Great Britain and Japan should also be applied to German residents, because of the most-favoured

³⁶ Letter from Parkes to Minister of Foreign Affairs Soejima, 5 August 1873, in *Meiji gonen yori nananen ni itaru gaikokujin soshōkisoku seiteiikken* (Gaimushō gaikōshiryōkan shozō 4mon 1rui 1kō 3gō).

nation treatment clause between Germany and Japan.³⁷ Through communication with the British and German consulates, the Japanese Ministry of Foreign Affairs accepted the fact that the enforcement of the court rules and procedures for foreigners was problematic and might create further issues, such as mixed jurisdiction. The Japanese government recognised that a foreign consulate's permission for its Japan-resident nationals to file lawsuits in Japanese civil courts was necessary, despite Article 5 of the treaty between Japan and Prussia stating "if a Prussian citizen has a complaint or grievance against a Japanese subject, the case shall be decided by the Japanese authorities".³⁸

Learning from their failure to enforce court rules and procedures for Westerners, the Meiji government and the Ministry of Justice started to establish and develop the domestic judicial system (court organisation structure) independence from administrative authorities, appeals' jurisdiction, judges and court clerks' supplies and so on), as well as further refine judicial procedures (civil and criminal court procedures). From December 1873 they proceeded to establish appellate rules, outlining them in a proclamation on 19 May 1874. These were the

³⁷ No.34 Letter from German Minister Resident (Chargé d'affaires) Max August Scipio von Brandt to Administrative Vice Foreign Minister Kagenori Ueno, 18 July 1873, in *Meiji gonen yori nananen ni itaru gaikokujin soshōkisoku seiteiikken* (Gaimushō gaikōshiryōkan shozō 4mon 1rui 1kō 3gō). Even though the Ministry of Justice was established in 1871, the courts did not have a clear definition of appeal relationships or organisational structure until 1875. In addition, in some provinces the local governments dealt with lawsuits alongside their administrative work.

³⁸ Gaimushō Jōyakukyoku (ed.), *Kyū jōyaku isan* (Tokyo: Gaimushō jōyakukyoku, 1931), pp.967-968.

first appellate proceedings in Japan, because the Edo era judicial system had neither a civil nor criminal appeals procedure. On 24 May 1875 the Constitution and Regulations for the Supreme and other Courts, Notification No.91 (Dajōkan Fukoku, Daishin'in shosaibansho shokuseishōtei), together with the Rules of Procedure in Appeals, Notification No.93 (Dajōkan Fukoku, Kōso jōkoku tetsuzuki), were published. This meant that for the first time Japan's judicial organisation became independent from its administrative power, and court rules and procedures, including, appellate rules, at last came into force.

The development of the appellate rules gave rise to another jurisdictional problem, namely whether or not they could apply to cases between Japanese people and foreigners. All the unequal treaties, signed with various Western nations, specified that Westerners could be plaintiffs but not defendants in a Japanese civil court; applying the appellate rules meant that if a Japanese defendant lost a case in a Japanese court against a Western plaintiff and then appealed it in a Japanese court, the Westerner would become an appellee (a defendant in an appellate court), which would contravene the terms of the unequal treaties. Therefore, the Japanese government chose not to notify the foreign consulates of the introduction of the appellate rules. According to Fujiwara, the Ministry of Foreign Affairs only informed the British and other foreign consulates of the appellate rules on 9 November 1875, fully six months after their introduction and

enforcement.³⁹ Of these foreign governments, it seems only the British voiced their opposition. On 11 November 1875 the British consulate notified the Japanese foreign ministry of their disapproval of the direct application of the appellate rules to British subjects; they insisted that Japan-resident Britons should ask for permission from the British consul before filing lawsuits in the Japanese civil courts. The British envoy proposed that an agreement on Japanese civil courts' appellate rules be negotiated between the British Consul of Yokohama and the President of the Tokyo Appellate Court. The application of appellate rules to British residents was therefore postponed until such negotiations could take place and an agreement come into effect. After negotiations between Hiram Shaw Wilkinson (1840-1926)⁴⁰, the British consular official in Yokohama, and Naritaki Nishi (1835-1891)⁴¹, the president of the Tokyo Appellate Court, a revised agreement was concluded on 13 April 1876. The Ministry of Justice announced on 1 November 1876 that this revised agreement would

³⁹ Akihisa Fujiwara, "Meiji shonen ni okeru Tokyo-fu saiban hō no tenkai: Minji saiban wo megutte", *Kobe hōgaku zasshi* Vol.35, No.4 (1986), pp.993-1044.

⁴⁰ Hiram Shaw Wilkinson was called to the Bar by Middle Temple on 26 January 1872. See Section 2 of this Chapter.

⁴¹ Naritaki Nishi was a former Bakufu officer of the Foreign Affairs Ministry and a specialised interpreter of Dutch and English; his family, although they were local commoners and not drawn from the samurai class, had been Dutch interpreters for two generations before him. Nishi (also known as Kichijyurō Nishi) became a shōgunate vassal (*bakushin*) and joined the Ken'ō shisetsu (Embassy to Europe) of the Edo Bakufu in 1863 (Bunkyū 3nen). After the Restoration he became an officer of the Shizuoka clan and then in 1871 came to the Ministry of Justice, becoming the president of Daishin-in (Predecessor of the Supreme Court of Japan) in 1890. See Naoki Kimura, *Tsūyaku-tachi no bakumatsu ishin* (Tokyo: Yoshikawa kōbunkan, 2012), pp.126-149; Shiro Ōue (ed.), *Meiji kakocho: Bukko jinmei jiten* (Tokyo: Tokyo bijutsu, 1971), p.324; Kato, Hideaki, "Tokugawa bakufu gaikokukata: Kindaiteki taigai jimu tantōshō no senku: Sono kikō to hito", *Nagoya daigaku hōsei Ronshū* No.93 (1982), pp.42-44; Yoshihiro Misaka, "Nishi Naritaki", *Meiji jidaishi daijiten*, Vol.3 (Tokyo: Yoshikawa kōbunkan, 2013).

apply not only in appellate courts but also in district courts (i.e. the first instance); it was also applied to other foreign nationals living in Japan.⁴² The most important aspect of the revised agreement was that it allowed for direct communication between the Japanese courts and British plaintiffs. Clause 4 stipulated that "after the Court has received the Petition, the Plaintiff should at any subsequent stage be at liberty to apply to the Court direct, either in person or by Attorney, and....should be heard". The 5th and 6th clauses defined how a notice might be served to a plaintiff; "notice of any proceeding may be given to the Plaintiff or his Attorney when attending the Court" and "notice of any proceeding may also be sent to the Plaintiff or his Attorney by post to the address named in the Petition, but so that it may be received by the Plaintiff in sufficient time to attend on the day named."⁴³ As a consequence of direct communications between British plaintiffs and Japanese courts, the British Consul could now only control the transmission of petitions to Japanese courts and file copies of Japanese court judgments.⁴⁴

In June 1877 the British consulate published a compilation booklet containing the revised agreement, the Japanese court procedures in English (with the original Japanese version

⁴² Chi No.1066 from Daishinincho to Osaka, Nagasaki and Miyagi jyoto saibansho, 1 November 1876 (*Naigai kōshō hōrei ruisan kan* (Hōmutoshokan shozō B900-S1-27)).

⁴³ FO881/4116 (held by National Archives, UK Foreign Office), "Agreement: Interlocutory Applications, Notices, Answer, Hearing, Attendance, and Judgement. Extract from Memorandum of 13 April, 1876, Cap II."

⁴⁴ Ibid.

attached) and forms for submitting the petition and forwarding the procedure. Entitled *Practical Directions for the Use of Her Majesty's Consular Officers in Japan, relating to Suits by British Subjects in Japanese Courts*, the booklet was intended to help British subjects and attorneys in utilising Japanese courts more effectively.⁴⁵ It consisted of four parts: Original Claims, Appeals by British Subjects, Appeals by Japanese Subjects and All Cases. A plaintiff's submission of a petition to the consul and the subsequent proceedings were described as follows:

(1) When a British Subject sends in his claim to Her Majesty's Consul in proper form with the fee, the Consul forwards the petition to the Japanese Court. (2) When the Consul receives from the Japanese Court a copy of the Defendant's answer, the Consul forwards the answer copy to the plaintiff and no time is named for the hearing. (3) When Her Majesty's Consul receives from the Japanese Court a copy of the Judgement in any case, the Consul numbers the Judgement with the number of the petition and files the Judgement in the Consulate. (4) When the British subject sends in his appeal in proper form, the Consul forwards petition of the appeal to the Court. (5) When the Consul receives from the Japanese Court a copy of the Respondent's Answer and no time is named for the hearing, the Consul forwards the answer to the appellant. (6) When the Consul receives from the Superior Court the Petition of

⁴⁵ Ibid. FO881/4116-256917.

Appeal from a Japanese Subject appealing against decision of a Local Court given in favour of a British Subject, the Consul forwards the petition of the appeal to the respondent, and then files in the Consulate a copy of the answer in appeal upon which the number and receipt are marked.

As has been shown clearly, one of the consequences of the unequal treaty between Japan and Britain was that it created a number of legal anomalies. For example, the treaty stipulated that foreigners could be plaintiffs but were not allowed to be defendants in Japanese civil courts. However, if a Japanese defendant lost such a case but did not accept the judgement, he/she could be an appellant against a foreigner in a Japanese High Court (Jōtō saibansho, later Kōsoin). This meant that foreign plaintiffs could actually become defendants within the Japanese court system, in spite of the treaty, as a foreigner could bring a case against a Japanese defendant to a Japanese civil court, win the case and then later become a defendant if the Japanese party decided to appeal to a higher court, even up to the Japanese Supreme Court (Daishin'in). It is worth noting that the agreement between the Japanese government and the British consulate had been concluded in spite of the unequal treaty, and that the day-to-day procedures of litigation were improved by it.

Lawsuits between British and Japanese subjects in Japanese courts were dealt with under these official procedures from 1

November 1876, and the prescribed procedures for British subjects were laid out in June 1877 by the British Consul, as mentioned above. It is interesting to note that the pressure to open up the Japanese civil courts to foreign residents came from both sides; whilst the Japanese authorities were keen to exercise expanded judicial control over Westerners, these same Westerners also sought to utilise the Japanese civil courts in order to enforce the judgments made in their favour.

There were a number of important ramifications of the new system. Foreigners from all the treaty-signatories could now sue Japanese in the local civil courts. Therefore, a British barrister in Japan could appear before the consular court as the defence counsel in a criminal or civil case or could represent the plaintiff, and could also appear before a Japanese court as a plaintiff counsel or as a respondent counsel in an appellate court in a civil case. Consular courts in Japan were important places for Japanese lawyers and plaintiffs to submit their petitions outside the jurisdiction of the Japanese courts. Similarly, foreign lawyers could take briefs for foreign plaintiffs to the Japanese civil courts. In addition, under the legal principles of the place of performance, the Ministry of Justice and the government now exercised jurisdiction even over cases in which both plaintiffs and defendants were foreign residents; this was an important expansion of the jurisdiction of Japanese courts. Japanese officers, legal advocates, legal practitioners,

plaintiffs and defendants now encountered Western lawyers in both consular and Japanese courts, and Japanese judicial officers sought to create or to establish civil procedures not only for foreign litigants but also for Japanese litigants utilising the civil courts.

In conclusion, the process of formalisation of the interlocutory litigation between the Japanese government and British legation propelled British barristers and their clients into Japanese civil courts; furthermore, they utilised rulings made in British courts. Interlocutory litigation offered Japanese legal practitioners, as well as officers and ordinary litigants, the first-hand opportunity to hear barristers' legal arguments and watch their behaviour in court. British barristers conducting litigation in the Japanese civil courts were therefore significant agents in legal professionalization in their own right.

Section 4: British Barristers in Meiji Japan

4-1 Arrival of the First Barristers

At the start of the Meiji era there were two kinds of court in Japan, namely the consular courts and the Japanese courts (as well as for domestic-only cases, the Japanese civil and criminal courts were also used for interlocutory litigation). From 1867 British barristers came to Japan to work for these courts as well as for their clients. In total 27 British barristers (technically-speaking one was a solicitor) were in active service from 1867 to 1898, plus 14 Japanese who had qualified as barristers in Britain (including one, Rokuichirō Masujima, who had actually practised in Britain). Table 2-3-1 shows a list of barristers and arrival dates in Japan, drawn from data in the Law List and other sources.⁴⁶ These barristers were one of the important channels in the Meiji era for the introduction of Western legal systems, and indeed for raising awareness of the concept of the legal profession itself.

After surveying those British barristers who joined the bar

⁴⁶ Table 2-3-1 was compiled from the following materials: *The Law Lists* (NB *The Law Lists* indicate places of register, rather than their actual residences or workplaces); Christopher Roberts, *The British Courts and Extra-territoriality in Japan, 1859-1899* (Leiden and Boston: Global Oriental, 2014) Appendix III 1-3; Joseph Foster (ed.), *Men-At-The-Bar: A Biographical Hand-List. Members of the Various Inns of Court, including Her Majesty's Judges, etc.* [2nd ed.] (Hazell, Watson, and Viney, 1885); *Register of Admissions to the Honourable Society of the Middle Temple: from the Fifteenth Century to the year 1944*, Vols. II & III (Butterworth & co., 1949); *Law Society Law Listings from 1867 to 1878*; Japan Gazette (ed.), *The Japan Directory, for the Year 1881* (Yokohama); Juichi Teraoka, *Meiji shoki no zairyū gaijin jinmeiroku* (Tokyo: Teraoka Shotō, 1978), pp.119-253; Takashi Itō and Harumori Ozaki (eds.), *Ozaki Saburō nikki*, 3 vols. (Tokyo: Chūō kōronsha, 1991-1992); Takutoshi Inoue, "Bakumatsu · Meiji · Taishō-ki Igirisu Nihonjin ryūgakusei shiryō (1)(2)", *Kwansei gakuin daigaku keizaigaku ronkyū* Vol.56, No.4, pp.135-206 (2003)/ Vol.57, No.1, pp.99-151 (2003); Masaaki Hori, *Ishin no eiketsu: Fukubara Yoshiyama no shōgai* (Yamaguchi: Ube nippōsha, 2012); Ikuko Fujita, *Nihon saisho no barisutā: Kyū Ube ryōshu Fukubara Yoshiyama-kō no sokuseki wo tazunete* (Yamaguchi: Yotsuba saron, 2013); Makiko Hayashi, "Naigai kosho sosho niokeru eikoku bengoshi no yakuwari", *Handai hōgaku* Vol.63, No.3=4, (2013), pp.507-535.

and appeared in court in early Meiji Japan, we will focus on the personal details of two barristers in order to discuss their careers and their influence on the construction of Japan's legal profession.

[Table 2-3-1] List of barristers in Japan (1867-1898)

[Table 2-3-1] List of barristers in Japan (1867-1898)		
Name of Lawyer [alphabetical order]	Call to the bar	Arrival in Japan
Adams, Francis Ottiwell	L. 5 May 1852	1868
Barnard, Frederick James	M. 17 Nov. 1864	1867
Beadon, R.J. [Robert John]	I. 17 Nov. 1870	1877
Bellasis, Herbert Inglefield	Solicitor (December 1875)	1878
Bonar, Henry Alfred Constant	M. 6 June 1894	1880
Bourne, Frederick Samuel Augustus	L. 18 June 1890	unknown
Brushfield, Harold Catmur	M. 22 June 1887	1893
Crosse, Charles Neville	I. 29 Apr. 1885	1893
Davidson, John Richard	M. 30 Apr. 1870	1872
Dickins, Frederick Victor	M. 10 June 1870	1st:1864/ 2nd:1871
Eames, James Brobly	M. 4 May 1898	unknown
Enslie, James Joseph	M. 13 June 1877	1st:by1861/ 2nd:unknown
Hall, John Carey	M. 29 June 1881	1882
Hannen, Nicholas John	I. 6 June 1866	1871
Jamieson, George	M. 9 June 1880	unknown
Kirkwood, William Montague Hammet	I. 30 Apr. 1873	1874
Litchfield, Henry.C.	I. 18 Nov.1867	1878
Lowder, John Frederic	L. 30 Apr. 1872	1st:1860/ 2nd:1872
McNeil, Duncan	I. 18 Nov.1889	1891
Ness, Gavin Parker	M. 6 June 1871	1873
Piggott, Francis Taylor	M. 17 Nov. 1876	1888
Platt, Winfrid Alured Comyn	L. 29 Apr. 1885	unknown
Robertson, Russell Brooke	M. 11 May 1881	1st:1860/ 2nd:unknown
Satow, Ernest Mason	L.17 Nov.1887	1st:1862/ 2nd:1895
Symonds, William North	I.26 Jan. 1898	unknown
Walford, Ambrose Berry	L. 18 Apr. 1883	1888
Wilkinson, Hiram Shaw	M. 26 Jan. 1872	1st:1864/ 2nd:1872
(Note) L: Lincoln's Inn, M: Middle Temple, I: Inner Temple		

Frederick James Barnard arrived in Japan in 1867 and started to work as a barrister just before the Meiji Restoration. Although other barristers listed in Table 2-3-1 had arrived in Japan earlier, such as Dickins and Robertson, they had not yet qualified

as barristers and came as student interpreters, doctors or in other roles. Barnard was the first barrister registered on the Law Lists to act in Japan and was registered from 1869 to 1870 in Yokohama, but as the legal service was very limited he soon left for Calcutta.

In 1871/72 Nicholas John Hannen, Hiram Shaw Wilkinson and Frederick Victor Dickins came to Japan (Wilkinson and Dickins had visited in 1864 but were not qualified as barristers at the time) and soon joined the bar as barristers in Yokohama. Hannen, who as we saw in Section 3 tried to draft the civil court procedure for foreigners in Japan, practiced in Japan as a barrister for ten years from 1871 before becoming a consular court judge from 1881 to 1891, and then moving to Shanghai to become the Chief Justice in the Supreme Consular Court from 1891 to 1900. Wilkinson also practised in Japan for an extended period, starting in 1872. From 1886 to 1897 he was a crown advocate in Yokohama before taking over from Hannen as the Chief Justice in the Supreme Consular Court in Shanghai from 1900 to 1905. Hannen and Wilkinson were thus both in Japan in the pioneer days of the profession and worked for 20 years or more as judges in the consular courts, the British Court for Japan and the Supreme Consular Court in Shanghai. Dickins stayed in Japan for a considerably shorter period, establishing himself as a lawyer for seven years in Yokohama and then returning to England, where he became a secretary-general at the University of London. Although he didn't become a judge, he

handled cases and appeared in the Japanese civil courts as well as the consular court early in the Meiji period.⁴⁷

The next barrister to arrive was John Richard Davidson in 1872; he worked as a legal adviser to the Ministry of Engineering from 1873 to 1878. Robert John Beadon arrived in 1877 and also became a legal adviser to the Ministry of Engineering (1877 to 1882) and then to the Ministry of Foreign Affairs (until 1883). The Ministry of Engineering needed Western legal advisers to help them in their contractual dealings with foreign companies, established in order to construct Western-style buildings, railways, telegraphs and the like.

The next three barristers, William Montague Hammett Kirkwood, Henry Charles Litchfield and Gavin Parker Ness, were actively engaged in the consular courts and the Japanese civil courts from 1873-1874 to the early 1900s. In addition, John Frederic Lowder opened a legal service at some point after 1872 (he was registered as a counsel in Japan in 1885 on the Law List), F.T. Piggott joined the bar in 1887, and Ambrose B. Walford started to practice in 1889. Because they did not have employment relationships with the Japanese government, Litchfield, Ness and Walford have not been considered to have played an important role in legal professionalization, and so the contributions of these barristers have not previously been examined in any detail. Even

⁴⁷ Yūzō Akiyama, *Nihon gakusha Furederikku V Dikinzu* (Tokyo: Ochanomizu Shobō, 2000); Frederick Victor Dickins (trans. Kenkichi Takanashi), *Pākusu den, Nihon chūzai no hibi* (Tokyo: Heibonsha, 1984 [1894]).

Kirkwood, who became a legal adviser to the Ministry of Justice, has not been tackled in depth by researchers.⁴⁸ Lowder, who was known as a diplomat and a legal adviser to the Japanese government at the Yokohama Customs, has not been investigated in relation to his career as a practicing lawyer. Piggott was known as a legal advisor to Prime Minister Hirobumi Itō, as well as the author of *Law of Torts* and of *Extraterritoriality*.⁴⁹ However, his career as a practicing lawyer in Japan has not been examined to date.

According to Christopher Roberts most British lawyers were English qualified. However, although he notes that Dickins and Ness were called to the Scottish Bar, the Law List indicates that they were both called to the Bar by Middle Temple, in 1870 and 1871 respectively. Barnard and Brushfield were called in Hong Kong in 1866 and 1890 respectively, and Litchfield was called and practised in Shanghai before moving to Japan to practise in 1878.⁵⁰

The careers of these barristers, especially those who were engaged in Japanese civil courts and left their names in judgements, should be examined in order to clarify their influence on rulings and on legal professionalisation in general.

⁴⁸ Yutaka Tezuka, "Shihōshō oyatoi gaijin Kākūdo", in *Meiji Shi Kenkyū Zassan* [Tezuka Yutaka chosakushū, Vol.10] (Tokyo: Keiō tsūshin, 1994 [1967]); Takanori Sueki, "Shihōshō komon Kākūdo to Meiji seifu", *Nihon Rekishi* No.759 (2011), pp.55-71.

⁴⁹ Francis Taylor Piggott, *Principles of the Law of Torts* (London: W. Clowes, 1885); Francis Taylor Piggott, *Extraterritoriality: the Law relating to Consular Jurisdiction and to Residence in Oriental countries* (London: W. Clowes, 1892).

⁵⁰ *Shanghai directory 1873* (Norton-Kyshe, 1898); Christopher Roberts, *The British Courts and Extra-territoriality in Japan, 1859-1899* (Leiden and Boston: Global Oriental, 2013), p.62.

4-2 A British Barrister's Role in Japan's Reception of Law

William Montague Hammett Kirkwood (1850-1926)⁵¹ contributed to the construction of the Japanese legal system, and the legal profession in general, as a barrister, legal adviser and legal translator. He translated new Japanese codes into English, such as the criminal and penal code, the civil code and constitutional law. These translations were made primarily for the British government's benefit, but also served to make other treaty-signatories aware of Japanese codification. As a legal adviser to the Ministry of Justice he drafted the amendments to the regulations governing legal advocates. It is even said that the term used in Japanese for barrister (*bengoshi*) came from Kirkwood himself; he didn't approve of the title *daigen'nin*, because this implied acting as an agent. Kirkwood suggested coining a more independent-sounding name to show that legal advocates clearly have the right to proactively represent their clients and to act on their behalf, albeit by always thinking of their clients' best interests.⁵² Moreover, he resolved difficult lawsuits concerning the Japanese government, such as the Chishima warship incident and the Takashima coal mine case, as well as dealing with daily cases as a barrister. By examining Kirkwood's life history and the lawsuits which he managed, we will be able to more fully

⁵¹ Takanori Sueki, "Shihōshō komon Kākūdo to Meiji seifu", *Nihon rekishi* No.759 (2011), pp.55-71. *The Times*, 30 March 1926. *The Law Times*, Vol. 161, 3 April 1926. Yutaka Tezuka, "Shihōshō oyatoi gaijin Kākūdo", in *Meiji Shi Kenkyū Zassan* [Tezuka Yutaka chosakushū, Vol.10] (Tokyo: Keiō tsūshin, 1994 [1967]).

⁵² Hōmu Daijin Kanbō Shihō Hōsei Chōsabu kanshū (ed.), *Nihon kindai rippō shiryō sōsho* Vol.25 (Tokyo: Shōji Hōmu Kenkyūkai, 1986).

understand his influence on Japanese lawyers in the Japanese courts.

Kirkwood was born on 22 March 1850 in Llandilofawr, Carmarthenshire, Wales.⁵³ He went to Bishops Hall boarding school in Taunton, Somerset,⁵⁴ and then entered Marlborough College (1866?-1871). After college he enrolled in the Inner Temple (1871-1873) and was called to the bar in 1873. Before coming to Japan he practised as a barrister for a year at 11 King's Bench Walk, Temple. Having got married in July 1874 Kirkwood arrived in Yokohama with his wife three months later, on 12 October 1874; he was 24.⁵⁵ ⁵⁶ He opened a firm in Yokohama, practising as an acting counsel until 1882.⁵⁷ He utilised the consular courts, as well as the Japanese civil courts, to resolve a number of disputes during this term.⁵⁸ Kirkwood became an H.M. Crown Advocate (1882-1885)

⁵³ The Bishop's transcripts, 1679-1876, No.0105156 (p.203), in *Utah: Filmed by the Genealogical Society of Utah (1949)*. Takanori Sueki, "Shihōshō komon Kākūdo to Meiji seifu", *Nihon rekishi* No.759 (2011), p.66. Kirkwood's father, John Townsend Kirkwood (1814-1902), served as Justice of Peace in Yeo Vale, Bideford, Devon & Gore Court. His mother, Eleauora Elizabeth Morrison Hammett Kirkwood (1820-1861), had married his father in 1838 in Bath, England. William was their fourth son.

⁵⁴ 1861 England Census, R.G.9-1619, Folio 39, p.35 (ancestor.co.uk). Takanori Sueki, "Shihōshō komon Kākūdo to Meiji seifu", *Nihon rekishi* No.759 (2011), p.66.

⁵⁵ "Passengers", *The Japan Gazette*, 12 October, 1874. Takanori Sueki, "Shihōshō komon Kākūdo to Meiji seifu", *Nihon rekishi* No.759 (2011), p.67.

⁵⁶ Marriage certificate 1874 Sept.6a/787, Cheltenham. The certificate listed his parents as 'spinster' and 'gentleman'.

⁵⁷ *The Law List*, 1882.

⁵⁸ Kirkwood was a very active man with a positive outlook. He enjoyed fishing, riding, swimming and playing whist, often holding Japanese-style drinking parties and formal dinner parties in his house (he founded Japan Brewery, later Kirin Brewery). He had both Japanese and British friends, acquaintances and clients. British barristers appear to have had strong ties amongst themselves. After his first wife died, Kirkwood married Ethel Kate Morriss at the Kanagawa consulate court on 16 July 1887; the marriage certificate shows that Ethel was 18 years old. Her father Edward Morriss was a banker who lived in Japan. Kirkwood seems to have had a very good relationship with Satow; a lot of information on Kirkwood and his wife can be found in Satow's diaries. For example, when Kirkwood had a proposal from the Japanese government to take up work in Formosa, Satow advised him to "be careful to obtain a definite recognized official position." (Ian Ruxton (ed.), *The Diaries of Sir Ernest Satow British Minister in Tokyo*

and later became a Legal Adviser to the Japanese Ministry of Justice (1885-1901),⁵⁹ assisting in drafting the codes of law and being highly decorated by Japan. He also became a legal adviser to the Formosa Governor-General's office and later an adviser to the first United States Philippine Commission, for which he received the thanks of Congress for his services. Having been in Japan for 28 years he retired back to London in 1902,⁶⁰ serving as a censor of the post in the War Office in 1916 and as a commissioner of the Boy Scouts. He died in 1926 at the Golf Hotel in St. Jean de Luz, France.⁶¹

Kirkwood is generally known to historians for his work as a barrister for the Japanese government in the Chishima warship incident of 1892.⁶² This incident, also known as the Chishima-Ravenna Collision, was an important consular court case in which the Japanese government appealed to the Judicial Committee of the Privy Council in London. However, we will discuss another Kirkwood case that influenced the Westernisation of the Japanese courts in the early Meiji era, namely the Takashima coal mine case, before

(1895-1900): *A Diplomat Returns to Japan* (Raleigh, NC: Lulu Press, 2010 [2003]), pp.22, 27, 32-34, 44-45, 82-84, 90, 251).

⁵⁹ *Kōbun zassan*, Meiji 34nen (1901), Vol.28, Ministry of Justice No.8 (San 00569100, Kokuritsu kōbunshokan).

⁶⁰ Kirkwood arrived at Southampton, England with his wife on 30 March 1902 via Shanghai and Colombo on the ship *Hamburg* (UK Incoming Passenger Lists, 1878-1960, ancestry.co.uk). Confusingly however, the Japanese newspaper *Yomiuri Shimbun* noted on 8 June 1906 that "He left for England the other day after 30 years staying in Japan." According to the newspaper, Kirkwood asked to take a photo of a geisha named Akiko with him. Further research will be necessary to clarify his leaving date, as *the Law List* shows that his qualification as a barrister in Yokohama was active until 1911.

⁶¹ He had no children.

⁶² For recent work on the Chishima incident see Christopher Roberts, *The British Courts and Extra-territoriality in Japan, 1859-1899* (Leiden and Boston: Global Oriental, 2013), pp.269-271, 289-313.

returning to the Chishima incident.

The Takashima case was held in a Japanese civil court in 1878, when the Westernisation of the Japanese court system had just begun. Jardine Matheson & Co. (hereafter, JM & Co.) had applied to the Tokyo Court on 1 November 1878 for a preliminary injunction against Shōjirō Gotō (1838-1897)⁶³ with regard to his coal mining activities and related use of machinery. At the same time JM & Co. filed a lawsuit seeking fulfilment of a contract with Gotō plus associated debt redemption. JM & Co. appointed Kirkwood as counsel, while Gotō appointed Tōru Hoshi (1850-1901)⁶⁴ and H.W. Denison⁶⁵ (an attorney-at-law). The preliminary injunction requested by Kirkwood was dismissed by the Tokyo Court on 12 November 1878 whereupon JM & Co. appealed immediately to the Tokyo Appellate Court, but on 11 March 1879 this petition was also rejected.⁶⁶ Interestingly, the arguments on both sides made use of British law; in the preliminary injunction lawsuit Kirkwood, as the plaintiff's attorney, made arguments based on British contract doctrine while the ruling of the Tokyo Appellate Court

⁶³ Shōjirō Gotō was a politician as well as a businessman who served as Minister of Communications (1889-1892) and as Minister of Agriculture and Commerce (1892-1894). See Keigetsu Ōmachi, *Hakushaku Gotō Shōjirō* (Tokyo: Fuzanbō, 1914).

⁶⁴ Hoshi became a seventh rank governmental officer in the Tax Administration Agency within the Ministry of Finance, then became a barrister in 1877.

⁶⁵ H.W. Denison had resigned as the U.S. Vice Counsel General at Yokohama and entered the practice of law in October 1878 (*Sacramento Daily Union*, Vol.7 No.199, 11 October 1878 (<http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=SDU18781011.2.13.1#>)).

⁶⁶ Nichibun Database No. 10000033-0091

(http://sky.nichibun.ac.jp/nbk_minji/minList.do?param=detail&formId=1&seq=1). The source is the Database of Civil Court Rulings Files held by the International Research Center for Japanese Studies [Nichibun] (http://www.nichibun.ac.jp/graphicversion/dbase/minji_j.html). This database offers image files of all the original documents of civil judicial judgments given between 1870 and 1890.

judge, which refuted JM & Co.'s claims, cited precedents from the Queen's Bench.⁶⁷ The lawsuits in this case seems to have been the first time that Japanese judges and court clerks were made aware of the preliminary injunction system, which was unknown to the Edo era judicature and was not formally instituted until 1890. It also featured legal arguments by both British and Japanese barristers and an American attorney in a Japanese court. This is one of the most important cases in Japan's reception of law, because it shows that a Japanese court was citing British law in its rulings (NB in the 1880s French laws were also applied in Japanese court cases). The importance of this case is its employment of the preliminary injunction procedure, which was virtually unknown in Japan at this time. The case shows that Japan's reception of law was now evolving to incorporate case law in its dispute resolution, and was also starting to feature cases contested by foreign barristers on one side (in this case British) and Japanese barristers qualified in the legal systems of their legal opponents (in this case a British-qualified Japanese barrister). The barristers themselves were thus also examples of the reception of law.

The Takashima case began with JM & Co. lending Shōjirō Gotō a large amount of money in November 1874 to enable him to buy the Takashima mine, which was owned by the government (it was the state's policy to sell their public utilities to the private

⁶⁷ *Taylor v Chester* (1869), LR 4 QB 309-315.

Japanese sector).⁶⁸ There were two contracts signed on 1 July 1875, one made between Edward Whittall (Yokohama agent for JM & Co.) and Gotō and the other between JM & Co. and Gotō.⁶⁹ When the two contracts were signed with Gotō in 1875 JM & Co. recommenced their active involvement in the Takashima mine project, although Gotō was now the owner. Under the first agreement Gotō hired Whittall (as sole agent of JM & Co.), but in reality the contract was a device that enabled Whittall (for which read JM & Co.) to loan Gotō monies for the development of the mine. Whittall became the sole agent for the sale of all coal produced from Gotō-owned Takashima collieries for the next fifteen years; Gotō was obliged to pay 5% commission on the selling price to Whittall and to provide a certain amount of dug coal production for the next fifteen years to Whittall as debt amortization.⁷⁰ This contract between Gotō and Whittall was necessary in order to circumnavigate the second and fourth clauses of the Japan Mining law (Proclamation No.259 (Nihon kōhō), the Grand Council of State, 20

⁶⁸ For the Takashima case, see Kanji Ishii, *Kindai Nihon to Igirisu shihon: Jādin Maseson shōkai wo chūshin ni* (Tokyo: Tokyo daigaku shuppankai, 1984), pp.250-261; Masahiro Okudaira, *Nihon Bengoshi shi* (Tokyo: Gan'nandō shoten, 1971 [1914]), p.257.

The Takashima case can be traced back to the signing of a Takashima coal mine investment agreement between Glover Co. Ltd. (the Nagasaki agency of JM & Co.) with Lord Hizen's domain (Saga Prefecture in the Kyushu region) on 3 June 1868, and also to the first successful intake shaft mining conducted in Japan by British engineers from 28 May 1869. Edward Whittall, Yokohama agent for JM & Co., visited the Takashima coal mine and reported that the machinery was perfect and the mine was in as complete a state as any in England. JM & Co., however, did not attempt to commence mining at this time because Glover Co. Ltd. went bankrupt in 1870, with the result that JM & Co. lost their connection to the project; only Whittall, the Yokohama agent, still had a strong connection to the mine.

⁶⁹ Kanji Ishii, *Kindai Nihon to Igirisu shihon: Jādin Maseson shōkai wo chūshin ni* (Tokyo: Tokyo daigaku shuppankai, 1984), p.290.

⁷⁰ Ibid., p.291.

July 1873). Clause 2 of the law stipulated that all minerals discovered in Japan shall be the property of the Japanese government, while Clause 4 ruled that non-Japanese citizens may not carry out prospecting, rent a mining area or extract any minerals.

The second contract, that concluded between JM & Co. and Gotō, was in consideration of certain sums of money acknowledged by Gotō to be due from him to JM & Co. A crucial distinction from the first contract was that this agreement was initially kept secret, because as mentioned above Japan's mining laws did not allow foreigners to control Japan's mines. This clause held that Gotō would make over to JM & Co. "the Takashima mine and the adjacent island and everything of whatsoever nature and kind, such as machinery and other appurtenances belonging thereto to hold and to work for his account under their sole or their agents management, until such time as the afore-mentioned indebtedness aggregating seven hundred and sixty-eight thousand dollars, or thereabouts, is paid off in full with interest."⁷¹ It noted that the agreements would not debar JM & Co. of the right to make a claim against Gotō "in the event of the mine and mines not being found sufficiently remunerative to wipe out the aforesaid indebtedness of seven hundred and sixty eight thousand dollars,

⁷¹ Ibid., p.251. In addition, JM & Co. were "given a first lien upon the output of the said mine or mines" as security for the expenses of working the same. The agreements also included clauses detailing the division between the parties of "any future net-profits of the mine or mines" in certain contingencies.

or thereabouts.”⁷²

Unfortunately for all parties, at this point the business came to a standstill. The coal was at the bottom of a seabed mine shaft, making extraction very difficult; coal production never reached the originally projected targets. Moreover, from 1870 through 1878 there were large-scale mine riots resulting from the inadequate compensation paid for deaths due to accident and from the low wages paid for such dangerous work. Due to these issues Gotō's debts to JM & Co. were not reduced at all, and mutual distrust between the parties escalated. JM & Co.'s head office in Shanghai concluded that the Yokohama agent, Edward Whittall, had financed Gotō without sufficiently researching the potential for coal production, and dismissed him on 30 April 1876.

Despite the negotiations between Gotō and JM & Co.,⁷³ the latter decided to submit a petition to the Tokyo Court on 1 November 1878 in which the plaintiff (JM & Co. and Kirkwood as their legal representative) requested various injunctions: that the defendant must not interfere with the mine's management; must not sell or encourage the sale of any coal produced; must not deliver or transfer any coal produced to a third party other than the plaintiff; must not use the various items of mining machinery;

⁷² Ibid., p.251.

⁷³ Gotō also had doubts about the accuracy of JM & Co.'s accounting procedures, and ordered an inspection of the Yokohama branch by a barrister (Frederick Dickins) and an accountant. These two British professionals issued a report concerning the account in question in November 1876. On 12 February 1878 Gotō finally cancelled the mine agent's contract with JM & Co., and started to manage the mine on his own.

and must not sell all or part of the mine or take out a mortgage against the mine.⁷⁴ The Tokyo Court rejected the plaintiff's claim, determining that it was not able to immediately instruct provisional disposition because the evidence had been insufficient. There were particular conflicts with the Japan Mining Law in the documentary evidence submitted; this law stipulated that the government retained full ownership of all minerals in the empire and prohibited both foreign ownership of coal mines and mortgages made against them.⁷⁵ Therefore, no decision could be made regarding provisional disposition until the agreements between the plaintiff and defendant were clearly accepted by the court as being legal under the Japan Mining Law.⁷⁶ It's important to note that at this time Japan had no formal system to govern injunction applications and procedure. When such a system was finally introduced in 1891, questions of the legality or lack thereof of any contracts forming part of a submission were not deemed relevant to determining any provisional injunction decisions. As such, it could be concluded that the Tokyo Court's decision in the 1878 Takashima case was contrary to British or 'correct' injunction procedure.

In explaining its rejection of the injunction application the court noted that they had not judged the plaintiff's claim to be illegal, and there was no indication that the court had not

⁷⁴ Rulings at Tokyo Court, 12 November 1878, No.13: Nichibunken Database No.10100001-0067. Masahiro Okudaira, *Nihon Bengoshi-shi*, pp.266-285.

⁷⁵ Rulings at Tokyo Court, 12 November 1878, No.13: Nichibunken Database No.10100001-0067.

⁷⁶ Ibid.

recognised the plaintiff's right to sue. Nevertheless, in a case lacking sufficient evidence, the court argued that it could not enforce the disposal of an injunction.⁷⁷ The fact that the court itself had the jurisdiction to deliver a judgement upon this matter seems however not to have been lost on the court, and was an important point in the development of the Japanese legal system.

The Tokyo Court's decision and reasoning, namely its rejection of the injunction application not on the grounds that the plaintiff's request was not lawful or that the plaintiffs did not have the right to submit this petition, but rather because the plaintiff had not submitted enough legal evidence, was repeated in the Appellate Court's rulings regarding the Appeal Motion. Nevertheless, it is crucial to note the Appellate Court felt fully justified in its right to make such decisions: "as to the jurisdiction of this Court to entertain the appeal motion, the Court has no doubt whatever of its jurisdiction, and is about to exercise it."⁷⁸

Hearings on the appeal motion ran from 2 December 1878 to the beginning of March 1879. As mentioned above, in the hearings the court refused to grant an injunction restraining the defendant from involvement with the Takashima mine, using its machinery or disposing of its produce.⁷⁹ In the hearings it became clear that

⁷⁷ Ibid.

⁷⁸ *The Japan Weekly Mail*, Vol.3 No.11, 15 March 1879, p.326.

⁷⁹ JACAR (Japan Center for Asian Historical Records) Ref. B11091676000, Zai Yokohama igirisu koku "Madeson" shōkai yori Gōto Shōjirō nikakaru Takashimatanko ni okeru kikai shiyo sashitome ikken Vol.2 (B-3-5-7-6_002) (Diplomatic Archives of the Ministry of Foreign Affairs of Japan); *Japan Herald*, 2 December 1878.

the aforementioned agreements between the parties were in violation of the Japan Mining Law.⁸⁰ The 1st clause of the Japan Mining Law stipulated that the government retained absolute ownership of all mine and all minerals throughout the empire, and the 2nd clause noted that it therefore followed that every Japanese citizen who works in prefectural mines is effectively working for the government, and so clearly has no right to use the mines they work in as loan security. During the period covered by the contracts between Gotō and JM & Co. and between Gotō and Whittall (the former secretly made on behalf of JM & Co.), the agreements allowed Gotō and JM & Co. to take out loans as security to creditors in default of payment; the agreements were thus in violation of the law.⁸¹

During the injunction appeal hearings Kirkwood expanded his legal arguments by citing the rulings of British courts. However, the appeal was finally dismissed; the court's ruling was based on the conflict between the law and the parties' agreements.⁸² Delivering the judgement Judge Nishigata⁸³ of Tokyo Appellate Court referred to British rulings in order to answer the question of whether or not the contracts between JM & Co. and Gotō were in violation of or contrary to the law. The judgement referred to

⁸⁰ Notification No.259 (The Japan Mining Law), issued on 20 July 1873.

⁸¹ "Law Reports", *The Japan Weekly Mail*, 15 March 1879, p.326.

⁸² Ibid.

⁸³ Ososhi Nishigata (Nishikata) (1838-1915) was an officer of the Ministry of Education who became a judge at the Tokyo Appellate Court in 1875 and at the Supreme Court from 1898. In 1872 he was asked to write 'Gakusei' (the first Japanese education law) based on the French legal system.

the theory of English law, noting that "the plaintiffs in this case, as well as their counsel, being Englishmen, the Court may be allowed to quote in this connection the language of one of the greatest of English Lawyers and Judges - Lord Mansfield." This would be unthinkable in contemporary Japan, but occurring as it did during this early stage of the reception of law Judge Nishigata's quotation of British precedent seems to have been accepted. The case is particularly interesting too in that not only was Nishigata using British systems and quoting British precedents, he was also arguing with a British barrister (Kirkwood) and ultimately managed to prevail over him. Furthermore, although to date most Japanese academics have emphasised the role played by the French and German legal systems in Japan's reception of law, this case shows that British case law also played an important role.

The appeal ruling made it clear that it was not possible for a court to enforce an agreement which contains any illegality.

⁸⁴ The court declared that "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act... [in such cases] the court says he has no right to be assisted...[the court] will not lend their aid to such a plaintiff."⁸⁵ The court declared that a plaintiff must prove that an injunction motion

⁸⁴ *Holman v Johnson* (1775) 1 Cowp 341; this ruling of the Tokyo Appellate Court quoted Mansfield's words in their entirety, but I have omitted the first and last parts. <http://uniset.ca/other/cs6/98ER1120.pdf> See also *The Japan Weekly Mail*, 15 March 1879, pp.327-328.

⁸⁵ *Ibid.*

would not be based on an illegal contract.

This decision shows that the Japanese courts of the time were starting to utilise British precedents in their rulings; in this case the Tokyo Appellate Court referred to three such precedents.⁸⁶ Furthermore, following the delivery of the verdict on 11 March 1879, an English translation of the decision was published just two days later in *The Japan Herald* and again on 15 March in *The Japan Weekly Mail*.⁸⁷ As it had been expected that the decision would be translated into English the ruling had included British precedents, in order to show the qualitative improvement in Japanese rulings. Notably, in the Japanese language decision the court had not refuted Kirkwood's claims in such strong terms as it did in the English version. Nevertheless, in both versions of the decision the court underlined that the contracts between both parties were void due to their violation of the Mining Laws.⁸⁸

However, this decision made it abundantly clear that the Japanese courts of the day had not understood the civil provisional remedies, including provisional seizure or injunction, that Kirkwood had based his arguments upon.⁸⁹ Under the typical Western system injunctions were usually issued only via a formal

⁸⁶ *Holman v. Johnson*, Cowper's Reports 341 (343); Kerr on *Injunctions*, p.209 (Chap. XV., No.20) citing *Harman v. Jones*, *Craig v. Phillips*, 301 Rig. and Great Western Railway Company v. Phillip, 49.; *Taylor v. Chester* Law Reports, 4 Queen's Bench, 306, p.314.

⁸⁷ JACAR: Ref.B11091676000; see also Masahiro Okudaira, *Nihon bengoshi shi*, p.266.

⁸⁸ Tokyo Appellate Court ruling, 11 March 1879, No.1047: Nichibunken Database No. 10000033-0091.

⁸⁹ During the hearings in this case Judge Nishigata was keen to hear the points of law that Kirkwood was using as the foundation for his argument, as Kirkwood had appealed to the court on the grounds that the Tokyo Court's refusal to grant an injunction was bad in law. *The Japan Weekly Mail* 1 February 1879, pp.132-133.

review before the real trial began in order to preserve the fulfilment of a right comprising the merits of a civil suit. However, it was hard for the Japanese courts at the time to issue injunctions without revealing crucial facts at the hearings, as ever since the Edo era Japanese judges had believed that they should exercise their decision-making powers based on the full facts, including knowledge of all the disputed materials. For this reason Kirkwood's injunction argument had not been accepted in court, and was dismissed.

Looking at the bigger picture, however, it could be argued that Kirkwood, acting for JM & Co., actually won this case. Although the principal action was held in the Tokyo Court from November 1878 to the end of April 1879, during the trial Kirkwood, acting for the plaintiffs, and Hoshi and Denison, for the defendant, were seeking to end the case via arbitration or mediation; they eventually reached a settlement out of court whereby Gotō should pay \$1.1 million to JM & Co. (the amount in dispute was \$1.3 million including interest). Both parties asked the court to deliver a judgement in accordance with their settlement, and this was subsequently delivered on 12 May 1879.⁹⁰

Through such interlocutory litigation, Japanese courts as well as legal advocates learned about many English laws and

⁹⁰ To be precise, the petition was dismissed on 30 April 1879, then after a new lawsuit was filed the ruling was immediately issued. *The Japan Weekly Mail* 26 April 1879, pp.528-529; *The Japan Weekly Mail* 3 May 1879, pp.557-558; *The Japan Weekly Mail* 17 May 1879, p.626.

systems, such as injunctions. In addition, both the Japanese and English languages were utilised in Japanese courts, orally and in writing. Interlocutory litigation thus exerted a very great influence on the Japanese legal world during the 1870s. When the Japanese government started its fully-fledged legal code compilation they consulted Kirkwood, especially with regard to the Code of Civil Procedure. In his written opinions Kirkwood strongly condemned Japan's procedure for evidence preservation and the safekeeping of disputed materials as being insufficient. Japan had no law in place governing this procedure, but following Kirkwood's advice and other developments a law was introduced in 1890. It was precisely because Kirkwood was a practicing legal professional who had appeared in Japanese courts that he was able to submit detailed opinions concerning Japan's civil procedure. The role of such lawyers in Japan's reception of law and their influence upon legal codification deserves further investigation.

4-3 Significance of the Qualification System

The distinguished achievements of the British barrister John Frederic Lowder (1843-1903) in the field of Japanese legal professionalisation eventually led to some Japanese advocates becoming British-qualified barristers (specifically, they were all English-qualified). This section will focus on Lowder as well as on Tōru Hoshi (1850-1901,) who was one of these British-qualified barristers from Japan. As we shall see both men emerged

from humble backgrounds and became 'modern professionals'. Unlike in pre-modern or feudal society, it was becoming possible in rapidly-modernising Japan, as it had earlier in Britain, to carve out a career as a professional by passing examinations and becoming qualified.

Lowder was born on 15 February 1843 in Christian Malford, Wiltshire, England.⁹¹ He studied at Christ's Hospital in Malford, having been admitted because he was the son of the Rev. John Lowder; his father died near Shanghai in 1849.⁹² ⁹³ After leaving school Lowder passed the examination for student interpreters in Japan held by the Civil Service Commissioners.⁹⁴ He came to Japan and was appointed a Student Interpreter in Edo (Tokyo) on 4th June, 1860,⁹⁵ being promoted to 3rd Assistant on 1 April 1864, to 2nd Assistant on 25 May 1865 and to Interpreter on 26 November 1866. He then became Vice-Consul at Hyōgo (Kobe) and Osaka on 1 January 1868 and Acting Consul at Kanagawa (Yokohama) from 12 August 1869 until 21 July 1870.⁹⁶

Lowder arrived in Japan just before the Meiji Restoration, when the Edo *Bakufu* was in rapid decline. He travelled widely

⁹¹ The 1871 England Census (Kent-Lee-District 8-61, p.20, ancestry.co.uk).

⁹² The 1851 England Census (Hertfordshire-Hertford St John-District Christ's Hospital, p.20, ancestry.co.uk).

⁹³ *The Sydney Morning Herald* Monday, 31 December 1849 (p.2 "Exports") reported the death of Lowder's father: "The Freak from Shanghai brings no shipping news, but reports the following:-The Rev. Mr. Lowder, Chaplain to the British residents in Shanghai, was unfortunately drowned in September last, when bathing off an island near Chusan, where he and his wife were on a cruise in H.M. brig *Mariner*, for the benefit of their health, leaving a widow and family unprovided for. The foreign community of Shanghai liberally subscribed the munificent sum of 15,000 dollars for their relief."

⁹⁴ *Bath Chronicle and Weekly Gazette*, 14 Jun 1860, p.5.

⁹⁵ *Foreign Office List* (1874), p.133.

⁹⁶ *Ibid.*

(Nagasaki 1864-1865, Niigata 1866, Hyōgo and Osaka in 1868) and met many Japanese who were to become the founders of the new Meiji state, Takayoshi Kido and Hirobumi Itō in particular.⁹⁷ Lowder wrote a private letter to Itō, Vice Governor of Hyōgo, to make enquiries about the case of his servant being taken away by Satsuma soldiers on 27 February 1868.⁹⁸ Their relationship continued until 21 July 1870, when Lowder went back to England in order to study law at Lincoln's Inn (NB he remained attached to the Consulate for another year).⁹⁹ He seems to have been an excellent student, as he was a candidate for the 'Studentship Examination or Honourable', and passed it in the Trinity Term 1871.¹⁰⁰ He was called to the bar on 30 April 1872.¹⁰¹

Lowder resigned from the British consulate on 4 September 1872¹⁰² and was appointed as a consul of the Japanese Government,

⁹⁷ *The Diary of Kido Takayoshi vol.1:1868-1871* (translated by Sidney Devere Brown and Akiko Hirota, University of Tokyo Press, 1985), pp.15, 303-304; Alexander McKay, *Scottish Samurai: Thomas Blake Glover 1838-1911* (Edinburgh: Canongate Press, 1993), pp.51-52; *Bōchō shidankai zasshi* interview. Lowder met two Chōshū men at Glover's house.

⁹⁸ Hitoshi Soeda, "Kōbe gaikokujin kyoryūchi to Fukuhara yūjo shinsengumi: Kōbe daigaku fuzoku tosyokan shozō Korekushon 'Kōbe kaikō monjo' no kanōsei", *Kōbe daigaku kaikō toshi kenkyū* No.5 (2010), pp.83-85.

⁹⁹ Records of *The Honorable Society of Lincoln's Inn*, Vol.2-1 *Admissions 1800-1893* (1896, p.344 (Folio 234)).

¹⁰⁰ According to the *Council of Legal Education Examination 1871-1878* (A.CLE11/2, IALS), he did not just pass the certificate examination but was also a candidate for the studentship or honourable examination (17-20 May 1871). I was able to access these documents through the assistance of Ms. Elizabeth Dawson, Archivist of the Institute of Advanced Legal Studies (IALS).

During his time studying in England Lowder lived with his wife Julia and his son Edward (eight years old, born in Japan) in Lewisham, then in Kent (1871 England Census, Kent-Lee-District 8-61, p.20, ancestry.co.uk). His occupation was recorded as 'Student of Law'. They were married in 1862 in Kanagawa, Japan. Julia Lowder and her father were missionaries from the United States).

¹⁰¹ Foster, *Men-At-The-Bar*, 1885, p.286. According to the *Council of Legal Education Examination 1871-1878* (A.CLE11/2, IALS), the subjects for examination were Real property, Constitution law, Jurisprudence and Roman law and finally Equity and Common law.

¹⁰² *Foreign Office List* (1874, p.133).

assigned as an adviser to the Yokohama Customs.¹⁰³ He began to practise as a barrister at the same time. We will discuss this aspect of his career later in regard to the civil cases he dealt with in the Japanese courts, but here we shall focus on Lowder's influence on various Japanese statesmen and on Tōru Hoshi in particular, who was called to the Bar by Middle Temple in 1877.

Lowder met Tōru Hoshi (1850-1901) on 12 February 1873, when Hoshi was assigned as an undersecretary to the Yokohama Customs. In 1873 Hoshi started to translate Blackstone's *Commentaries on the Laws of England*, finally publishing it in Japanese in 1878.¹⁰⁴ Lowder gave Hoshi personal lectures on English and English law several times a week after the latter became the Director-General of Yokohama Customs on 20 January 1874.¹⁰⁵ Their relationship continued even after Hoshi was promoted to the main office of the Ministry of Finance in Tokyo, when he came down to Yokohama to learn English law from Lowder once or twice a week.¹⁰⁶

On 14 July 1874 Hoshi resigned from his position as the Director-General of Yokohama Customs, and was promoted to chief of the Foreign Affairs Division of the Ministry of Finance. On 2 August 1874 Hoshi became the First Attaché for treaty revision. He was ordered to go to the United Kingdom on business on behalf

¹⁰³ Ōkura-Shihō ryōshō yatoi (Foreign Adviser to the Ministries of Finance and Justice).

¹⁰⁴ The translations of the *Commentaries on the Laws of England* were published as Blackstone (translated by Tōru Hoshi), *Eikoku hōritsu zensho* (Tokyo: Kamejirō Higashinari et al., 1873). Keiichi Nozawa (ed.) (annotated by Masaru Kawasaki and Yoshihiro Hirose), *Hoshi Tōru to sono jidai* (Tokyo: Heibonsya), pp.78-79.

¹⁰⁵ Keiichi Nozawa (ed.) (annotated by Masaru Kawasaki and Yoshihiro Hirose), *Hoshi Tōru to sono jidai* (Tokyo: Heibonsya), p.86.

¹⁰⁶ Ibid. , p.86, p.93.

of the Grand Council of State (Dajōkan) as a high-level official on 29 September 1874.

Hoshi's study abroad as a governmental officer was realised through his request to and connection with Munemitsu Mutsu (1844-1897), a senior government officer, but his inspiration for going was Lowder and his English and English law classes.¹⁰⁷ Lowder advised Hoshi to study law at the Inns of Court;¹⁰⁸ notably however, although Lowder had been called to the Bar at Lincoln's Inn, Hoshi entered Middle Temple, as only this inn was accepting overseas students regularly in the late 19th century. It seems to have been a matter of common knowledge that "among the inns the Middle Temple was the most cosmopolitan, the most democratic in its dining arrangements (being alone in not ordering the tables by seniority) and perhaps the most sociable".^{109 110}

Hoshi arrived in London in December 1874 and entered the Middle Temple the next month; he was admitted to the Bar in June 1877. Gaining his barrister's qualification in only two and a half years seems to have been quicker than other members of the Inn; he certainly studied hard during his time there, although in fact

¹⁰⁷ Shigemitsu Ishii, "Hoshi Tōru: Eigaku to kindai shugi", *Kinki daigaku gogakukyōyōbu kiyō* Vol.5, No.1, (2005), p.26.

¹⁰⁸ Sadao Ariizumi, *Hoshi Tōru* (Tokyo: Asahi Shinbunsha, 1983), p.33.

¹⁰⁹ Patrick Polden, "The Legal Professions", in William Cornish et al. (eds.), *The Oxford History of the Laws of England*, Vol.XI (Oxford: Oxford University Press, 2010), p.1087.

¹¹⁰ William G. Thorpe, *The Still life of the Middle Temple with some of its Table Talk* (London: Richard Bentley and son, 1892), p.331. In addition, Raymond Cock notes that "the evidence for this lies in the way that when dining in Hall there was a general mixing in the 'Side-Messes' for barristers and students"; "The Middle Temple in the 19th Century" in Richard O. Havery (ed.), *History of the Middle Temple* (Oxford and Portland: Hart Publishing, 2011), p.291.

he did not gain particularly good marks.¹¹¹ He does not seem to have mixed much with other London-resident Japanese.¹¹²

Hoshi was not the first Japanese barrister¹¹³ but nevertheless was very important as a symbol of modern Japanese society - he was proof that the abolition of class privilege in Japan (the hierarchy of samurai, farmers, artisans and merchants) was having some effect in liberating people and allowing them to choose their work and residence. Although there were many Japanese in London in the late 19th century most of them were young upper-class members of the samurai (ex) nobility, the very class that had driven the Meiji Restoration. The samurai in total were only the top 7-8% of the population, however, and people from lower-ranking backgrounds in the old hierarchy were starting to break through. Hoshi came from a very poor family, and the underprivileged nature of his early days was similar to Lowder's. Being a member of a profession in a modern society, regardless of origin, was and is a way for any individual to play an active and important role in society.

¹¹¹ According to *The Council of Legal Education Examination 1871-1878* (A.CLE11/2, IALS), pp.62-64, Hoshi scored 280 out of the maximum 500 marks; the minimum required was actually 300, although the other candidates scored 277, 245 and 243. I was able to access these documents through the assistance of Ms. Elizabeth Dawson, Archivist of the Institute of Advanced Legal Studies (IALS).

¹¹² Keiichi Nozawa (ed.) (annotated by Masaru Kawasaki and Yoshihiro Hirose), *Hoshi Tōru to sono jidai* (Tokyo: Heibonsha), p.94.

¹¹³ The first Japanese barrister was Yoshiyama Goronosuke [Fukubara Yoshimichi (Yoshiyama)], who was called to the Bar by Lincoln's Inn on 6 June 1874. See Masaaki Hori, *Ishin no eiketsu: Fukubara Yoshiyama no shōgai* (Yamaguchi: Ube nippōsha, 2012) and Ikuko Fujita, *Nihon saisho no barisutā: Kyū Ube ryōshu Fukubara Yoshiyama-kō no sokuseki wo tazunete* (Yamaguchi: Yotsuba saron, 2013).

[Table 2-3-2] Japanese barristers called to the bar (1868-1898)

【able 2-3-2】 Japanese barristers called to the bar (1868-1898)	
Name of Japanese barristers	Call to the bar
Yoshiyama, Goronoske [福原 良通 (芳山)]	L. 6 June 1874
Hoshi, Toru [星 亨]	M. 13 June 1877
Nagaoka, Moriyoshi [長岡 護美]	M. 3 July 1878
Iryie [Hozumi], Nobushige [入江 (穂積) 陳重]	M. 25 June 1879
Sagisaka, Naoshi [向坂 允]	M. 25 June 1879
Okamura, Teruhiko [岡村 輝彦]	M. 26 Jan.1880
Sanjo, Jiju [三條 公恭]	I. 17 Nov. 1880
Masujima, Rokichiro [増島 六一郎]	M. 6 June 1883
Hijikata, Yasushi [土方 寧]	M. 17 Nov. 1890
Uyemura, Shumpei [植村 俊平]	M. 17 Nov. 1891
Tomidzu, Hirono [戸水 寛人]	M. 26 Jan. 1893
Shimizu, Ichitaro [清水 市太郎]	M.14 June 1893
Mutsu, Hirokichi [陸奥 広吉]	I. 17 Nov. 1893
Mochizuki, Kotaro [望月 小太郎]	M. 6 June 1894
Note) L: Lincoln's Inn, M: Middle Temple, I: Inner Temple	

Despite not entering school or having any formal education until he was twelve years old, Hoshi later became a member of the Imperial Diet, the Speaker of the House of Representatives, the Japanese envoy to the United States and the Minister of Posts and Telecommunications in the fourth Itō Cabinet in 1900. It was his meeting with Lowder that was the fundamental moment in affecting his life-course, not only through being taught English and English law, but also through what he learned about the professions in a modern society.

Lowder worked for approximately sixteen years as a Technical Adviser to the Japanese government, in particular for the Ministry of Finance and the Ministry of Justice. One of the most prominent roles in his career was his work as a counsel for the Governor of Hyōgo Prefecture. In 1886, in the British Consulate in Yokohama, Lowder accused ship's captain John William Drake of criminal manslaughter. This formed part of the Normanton Incident, which was the running aground and sinking on 24 October 1886 of the British merchant vessel Normanton off the coast of Wakayama Prefecture. The entire crew of Britons and Germans were saved, including the captain, but all 23 Japanese passengers died. The marine accident inquiry was held promptly at the British Consulate in Kobe, but on 6 November 1886 the British consul James Troup judged no-one to be at fault for the accident. This adjudication prompted Japanese newspapers to loudly protest against this supposed unequal treatment and by extension against the unequal treaties themselves.¹¹⁴ The Japanese government decided to submit a petition to charge the captain in the Japan-based British court system; Lowder was appointed as the counsel for Hyōgo Prefecture. During the preliminary trial, which was held in Kobe, Lowder had appeared in the consulate court alongside Masujima Rokuichirō, who was also a barrister and had been called

¹¹⁴ Kiyoko Toda, "Meiji zenki ni okeru jōyaku kaisei to shinbun hōdō: Norumanton-gō jiken hōdō wo chūshin ni", *Nara kenritsu daigaku kenkyū kiyō* Vol.14, Nos.2=3 (2003), pp.111-118; Keiō Gijuku Daigaku Hōgakubu Seiji Gakka Tamai Kiyoshi Kenkyūkai (ed.) (2009), *Norumanton-gō jiken to Nihon no masumedia* [Kindai Nihon seiji siryou, Vol. 16] (Tokyo: Keiō gijuku daigaku hōgakubu seiji gakka Tamai Kiyoshi kenkyūkai, 2009).

to the Bar by Middle Temple on 6 June 1883. Their legal dress, particularly wigs, impressed Japanese people: "It was like the British court and was very new".¹¹⁵ It was then decided to transfer to a full trial in Yokohama, where Judge Hannen punished Captain Troup with three months' imprisonment.¹¹⁶

The Meiji Restoration was, to a great extent, the work of young men from lower-class samurai and commoner backgrounds. Lowder was living proof to members of the latter group, such as Hoshi, that despite their status (or lack of it) they could do well. Lowder was from a poor father-less family and in his younger years had had very little education, but nevertheless he had become a professional by studying hard to pass examinations to become firstly a student interpreter and later a barrister. This was seen as one of the most important aspects of the emerging modern Japanese society; many young Japanese who were not from the ruling class could make up for any disadvantages of birth by passing exams to become legal advocates or enter other professions. In addition to Lowder, Russell Brooke Robertson and Ernest Mason Satow were British consular officers in Japan who had acquired barristers' qualifications while holding their posts; they had also gained their first foothold on the professional ladder by working as student interpreters. Although Japan's reliance on

¹¹⁵ Harujiō Nakayama (ed.) (1887), *Eikoku kisen Norumanton-gō chinbotsu no tenmatsu* (Osaka: Kyobundō), pp.73-74.

¹¹⁶ Gaimushō (ed.), "Eisen «Normanton» gō chinbōtsu jōkyaku sōnan no ken", *Nihon gaikōmonjyō Vol.19 (1886 nen)* (Tokyo: Nihon kokusai rengō kyōkai, 1952).

status to determine one's role in life was starting to weaken, the introduction of a qualification system further accelerated this change; for young men like Hoshi, gaining qualifications was a key way to break free from Japan's class constraints. The introduction of such meritocratic systems is a fundamental element of modern societies and was seen as an important stage for Japan in its continuing development.

To sum up, encounters with Western lawyers helped introduce the modern legal system to Japan and craft Japan's response, especially in the utilisation of defence counsels in criminal cases, in the formalising of civil procedures and legal debates in trials involving the injunction system and in understanding the legal profession as it actually functioned on a daily basis. In addition, these encounters also helped establish the concepts of 'the professional' and of 'professional career', both previously unknown in Japan's pre-modern feudal society.

Chapter 3 Diversity: Actual Legal Practices

Section 1: Introduction

Section 2: Hybrid Judicial System

Section 3: Conciliation Procedure

Section 4: Significance of Adjudication

Section 1: Introduction

Although Western legal systems were introduced into Japan in the Meiji era, this does not imply that pre-Meiji Japan was not governed by law. In fact there was a wide variety of national, regional and local practices; Wigmore has identified Edo-era Japan as a case-law country within which highly organised judicial systems overseen by official judges had been developed.¹ Although many Edo legal practices were carried out by the Shogunate's magistrates, there was ample room for private legal practitioners to carry out their work on behalf of their clients. Former research in this area has examined the activities of *kujiyado shujin* (suit-inn proprietors) and *kujishi* (suit-inn solicitors); these activities had three defining features.² Firstly, suit-inn

¹ John Henry Wigmore, *A panorama of the world's legal systems* (Saint Paul: West Publishing Company, 1928), p.504 (Vol.2) referred the similarity concerning the independent development of the judicial precedent by judges between the Edo era legal system and the English legal system after 1400s. Fumio Jinbo, "Bakufu hōsō to hō sōzō: Edo jidai no hō jitsumu to jitsumu hōgaku", in *Hō-bunka no nakano sōzōsei: Edo jidai ni saguru* (edited by Kokugakuin Nihon Bunka Kenkyūjo. Tokyo: Sōbunsha, 2005), pp.103-141.

² Masajirō Takikawa, *Kujishi · kujiyado no kenkyū* (Tokyo: Akasaka shoin, 1984). Kazuo Minami, "Kujiyado no kinō to jittai", in *Bakumatsu toshi shakai no kenkyū* (Tokyo: Hanawa shobō, 1999[1967]), pp.169-207. Hiroshi Harafuji, "Kinsei minji saiban to 'kujishi'", in *Bakuhatsu kokka no hō to shihai* (edited by Hideo Ōtake and Hiroshi Harafuji. Tokyo: Yūhikaku, 1984), pp.331-407. Kazuko Kukita, "Naisai to kujiyado", in *Saiban to kihan* [Nihon no Shakaishi, Vol.5] (edited by Naohiro

proprietors undertook work at the request of a local magistrate's office. They handed summons to the parties involved (accused, defendants and guarantors) and held the accused in custody (including pending detainees) in their inns. Recent research has referred to the suit-inns as being embedded within a system of patronage, with the magistrates as the patrons seeking to control local legal environments via their patronage of cooperative inn-owners. The second defining feature of these professions is that they promoted the services offered by magistrates' offices to local people and could respond efficiently to local requests for legal advice on how to proceed with petitions. The final feature is that suit-inn proprietors and solicitors mediated settlements between the parties. If an out-of-court settlement was agreed upon, they would write the documents to submit to the magistrate's office. Sometimes they taught local people negotiation strategies that would enable them to denounce the injustice of village officials or even sue them. This required a degree of political awareness, as suit-inn owners had to assess the relative positions of three parties: local people, village heads and magistrates' offices.³

Asao, Yoshihiko Amino, Keiji Yamaguchi and Takashi Yoshida. Tokyo: Iwanami Shoten, 1987), pp.317-39. Takashi Tsukada, "Soshō to kujiyado", in *Mibunron kara rekishigaku wo kangaeru* (Tokyo: Azekura shobō, 2000[1989]), pp.52-74. Masashi Yoshida, "Sendai jōka no goyō yado", in *Kinsei hō no saikentō: Rekishigaku to hō-shigaku no taiwa*, (edited by Satoru Fujita. Tokyo: Yamakawa shuppansha, 2005), pp.89-115. Tadahisa Sakamoto, *Kinsei toshi shakai no 'soshō' to gyōsei* (Tokyo: Sōbunsha, 2007).

³ Kazuko Kukita, *Bakumatsu nihon no hō isiki: kinsei kara kiindai e* (Tokyo: Gan'nandō shoten, 1982); Kazuko Kukita, "Naisai to kujiyado", in *Saiban to kihan [Nihon no Shakaishi, Vol.5]* (edited by Naohiro Asao, Yoshihiko Amino, Keiji Yamaguchi and Takashi Yoshida. Tokyo: Iwanami Shoten, 1987), pp.317-39.

The three features mentioned above show that suit-inn proprietors and solicitors were deeply involved in mediation activities and the building of mutual understanding between magistrates' offices and local people. They had the skills and experience necessary to coach the parties involved in the forms of language that magistrates would accept, and to write the formal letters which the magistrate's office required. It's clear that they worked for both magistrates' offices and private clients in order to resolve disputes. According to Hiroshi Harafuji, the main driver behind the development of the professions of suit-inn proprietor and solicitor in Edo-era civil trials was the Shogunate's litigation policy; magistrates could not flatly suppress lawsuits nor actively carry out trials. Rather, they were required to be didactic; they should outline the pros and cons of the case to the parties and encourage them to withdraw their complaints. The best solution was always seen as an out-of-court resolution of a dispute through making a mutually-acceptable settlement.⁴ From the point of view of magistrates' offices, the advantage of the suit-inn proprietors was that they conducted the settlement mediation outside the courts but yet were familiar with the style and preferences of the magistrates.

The second and third defining features of the suit-inn proprietors, namely that they promoted the variety of procedures

⁴ Hiroshi Harafuji, "Kinsei minji saiban to 'kujishi'", in *Bakuhon kokka no hō to shihai* (edited by Hideo Ōtake and Hiroshi Harafuji. Tokyo: Yūhikaku, 1984), pp.331-407.

of the magistrate's office and mediated settlements between the parties, were later to become key activities for the legal advocates and attorneys of the Meiji era. In this chapter I will consider the legal practices and activities of these legal practitioners during the process of reception of Western legal systems. This chapter reveals how the modern Japanese judicial system adapted to the introduction of Western laws and legal systems by constructing a hybrid court structure which concurrently allowed for the enforcement of three dispute resolution systems, namely the Edo-era traditional civil dispute settlement systems (the out-of-court mediation and the court conciliation or *kankai*) and the Western-style adjudication system.

In order to clarify the court practices of the era, Section 1 of this chapter outlines the sources of the laws which were utilised in court during the early Meiji era and attempts to quantify the number of cases in conciliation and adjudication and the number of qualified and non-credentialed legal practitioners. Section 2 examines conciliation in more detail by providing brief portraits of a few of the qualified and non-credentialed legal practitioners who made use of it and by analysing the contents of disputes and their resolution via conciliation; this will allow us to highlight the differences between conciliation and arbitration. The third section focuses on labour disputes as an example of the type of dispute that could be resolved by the Western adjudication system; it had been difficult to submit

labour dispute petitions within the Edo-era judicial system.

Section 2: Hybrid Judicial System

2-1 Sources of Law and Legal Interpretation

The absence of systematised codes during the early Meiji period should not be taken to mean there were no rules or sources of law available. Before considering specific court rulings or dispute resolution methods, the sources of law being utilised in trials must be clarified.

In 1867, in what became known as the Meiji Restoration, the Shogun returned political power to the Emperor. The new political leaders of the Meiji government agreed to utilise a selected few of the already-established Shogunate laws (*kujikata osadamegaki*).⁵ The Meiji government extended the use of these Edo era laws, which had previously only applied in Shogunate domains, to serve as criminal law throughout Japan until the compilation of a new criminal code was complete.⁶ Under Edo criminal law⁷ the balance or equilibrium between the seriousness of a charge and its treatment and sentencing was preserved by officers who were appointed to judicial positions by the Shogun or feudal lords (*daimyō*).⁸

⁵ In 1742, under the eighth Shogun Tokugawa Yoshimune, written decisions for lawsuits known as *Kujikata Osadamegaki* or *Osadamegaki hyakkajyo* were compiled into a code of civil as well as criminal procedures and laws. See, Tatuya Tsuji, "Politics in the Eighteenth Century", in John Whitney Hall (ed.), *The Cambridge History of Japan*, Vol.4: Early Modern Japan (Cambridge: Cambridge University Press, 1991), 454-455.

⁶ 22 October 1867 (Keio 3-nen), *Hōkibunruitaizen Keihōmon 1*, p.1; No.916, Meiji 1-nen, *Hōreizensho*. See Hiroshi Harafuji, "*Kujikata osadamegaki*" *kenkyū josetsu* (Tokyo: Sōbunsha, 2010), p.694.

⁷ Civil laws were unseparated from criminal laws in Edo era, in respect of the protection of private rights by using penalty or lenient sentence. See Hiroshi Harafuji, *Keiji hō to minji hō [Bakuhantaisei kokka no hō to kenryoku]*, Vol.4] (Tokyo: Sōbunsha, 1983), p.34.

⁸ Harafuji, *Keiji hō to minji hō*, 1983, pp.63-67,78.

Although under the Western system judges dealt with civil and criminal cases, in Edo-era Japan it was governmental officers. They delivered judgements by applying rules and citing precedents, as well as simultaneously carrying out the regional administration of such matters as taxation and policing.⁹ These officers delivered their decisions in the same manner as they did administrative decisions, frequently asking senior officers for their approval. In order to deliver balanced judgements they took into account precedents and orders from the authorities. There was little discretion afforded to them in making their assessments because of the rigid application of the notion of equilibrium between crime and punishment, between charge and sentence.¹⁰

In the Edo era the various local and regional authorities used laws and rules for the assessment of the culpability of criminals. These standards were not publicly promulgated; they were closely guarded by the authorities, even to the extent of the public not knowing whether the rules were binding or not. In fact judicial officers were bound by the rules, which made the law and criminal trials fair, even if secret. Officers were keen to treat suspects and punish criminals equally, and to be seen as doing so, on the grounds that it was the only way to gain the

⁹ "Administrative and judicial functions were not clearly distinguished(...). Criminal and civil law overlapped to considerable extent; procedural and substantive laws were inextricably intertwined in much the same way that they were in the forms of action at common law." (Dan Fenno Henderson, *Conciliation and Japanese Law: Tokugawa and Modern*, Vol.1 (Seattle: Washington University Press, 1965), p.51).

¹⁰ Yoshirō Hiramatsu, *Kinsei keijisoshōhō no kenkyū* (Tokyo: Sōbunsha, 1970), pp.840-882.

public's trust in the judgements; criminals were to receive the same punishments for the same kinds of crime. It was not a justification of criminal trials from the perspective of procedure, but from the result.¹¹

In the early Meiji period officers from the Edo era (known as *yoriki* and *dōshin*) were employed to conduct administrative work as well as criminal and civil trials utilising Edo rules.¹² Because the Meiji government wanted to avoid establishing a new criminal trial system that would have lacked written rules, they declared that they would choose and utilise reasonable rules from the Edo era.¹³ The court officers' work, such as preserving the continuity of the judicature, the secrecy of laws and the equilibrium between crime and punishment, contributed to the development of criminal practice during the period.¹⁴ These officers were gradually replaced by new judges after 1872.¹⁵

¹¹ Satoshi Takahashi, *Edo no soshō* (Tokyo: Iwanami shoten, 1998).

¹² Hiromichi Fujita, "Fuken saibansho secchi no hitokoma", in Hiromichi Fujita, *Shinritsu kōryō · Kaitei ritsurei hensanshi* (Tokyo: Keiō gijuku daigaku shuppankai, 2001[1973]), pp.325-326; Harafuji, "*Kujikata osadamegaki*" *kenkyū josetsu*, 2010, p.695; Takahiko Yasutake, "Osaka machibugyōsho kara Osaka-fu he: Bakumatsu kara Meiji shonen ni okeru machibugyōsho yoriki · dōshin no dōkō wo chūshin ni (1)", *Nara Hōgakkai Zasshi* Vol.12, Nos.3=4 (2000), pp.138-142.

Yasutake clarified the case of Osaka machibugyōsho; The morning after the fifteenth Shogun Yoshinobu escaping from the Osaka Castle to Tempōzan oki, leaving port by the warship, officers of Osaka machibugyōsho, who did not know the escape, decided to evacuate from their office in great haste on their own. It was the morning of 7th January 1868. Two days later, on 9th January, Chōshū and other members of new governments came into Osaka, and pronounced the utilisation of shogunate laws and institutions but suspension of taking cognizance of cases. New government recruited the officers of Edo era at the same time in order to avoid the chaos. Almost half of the officers were reemployed and organized by the new government, then restarted the police administration and judicial works from the end of February (Yasutake, "Osaka machibugyōsho kara Osaka-fu he (1)", 2000, pp.145-162).

¹³ No.27, 22nd December, Keiō 3-nen Hinotou (1867).

¹⁴ Yasutake, "Osaka machibugyōsho kara Osaka-fu he (2)", 2001, pp.46-47.

¹⁵ Yasutake, "Osaka machibugyōsho kara Osaka-fu he (2)", 2001, pp.65-72. After the abolition of the feudal domains and establishment of prefectures on 14th July 1871, most former shogunate officers were removed from the name list of Osaka

Before the Westernisation of the Criminal and Penal Codes in 1880 (enforced from 1882), three main sets of criminal codes were utilised concurrently: the Provisional Penal Code (*Kari keiritsu*; 1868), the Outlines of the New Criminal Law (*Shin ritsu kōryō*; 1870) and the Amended Criminal Regulations (*Kaitei ritsu rei*; 1873). These three penal codes were compiled by the Meiji government with reference to Shogunate laws, the laws of Kumamoto and other domains, ancient laws (such as *Yōrō ritsu*) and Chinese laws (*ritsu*), such as Ming and Qing.¹⁶ This ensured the continuity of criminal law as well as the judicial system so as to avoid social disorder during the Meiji Restoration period.¹⁷ The use of these Edo criminal laws was finally brought to an end with the introduction in 1880 of the Criminal Code, which was transplanted from French and other European criminal codes.¹⁸

Unlike the three criminal *ritsu* codes, civil law had only single decrees, proclamations and ordinances, often issued in

prefecture. Some selected officers went to Osaka court established in October 1872 in order to take charge of criminal as well as civil cases. Even still hired officers, however, became at the lower level than the officers from Meiji government.

¹⁶ Hidemasa Maki and Akihisa Fujiwara (eds.), *Nihon hōseishi* (Tokyo: Seirin shoin, 1993); Hiroshi Asako, Takao Itō, Nobuhiro Ueda, Fumio Jinbo (eds.), *Nihon hōseishi* (Tokyo: Seirin shoin, 2010), pp.288-291. For more specific discussion, also see, Hiromichi Fujita, *Shinritsu kōryō · Kaitei ritsurei hensanshi* (Tokyo: Keiō gijuku daigaku shuppankai, 2001); Takeshi Mizubayashi, "Shin ritsu Kōryō · Kaitei ritsurei no sekai", in Shirō Ishii and Takeshi Mizubayashi (eds.), *Hō to Chitsujo* [Nihon kindai shisō taikēi, Vol.7] (Tokyo: Iwanami shoten, 1992), pp.454-551.

¹⁷ Ryōsuke Ishii (trans. William J. Chambliss), *Japanese Legislation in the Meiji Era* (Tokyo: Pan Pacific Press), 1958, pp.335-339.

¹⁸ The government made clear the basic policy on the criminal code codification on 20 September 1875; French criminal code should be modelled for the highest priority and other countries' criminal codes such as German, Belgian, Dutch, English, California and Egyptian penal laws serve as models (Waseda Daigaku Tsuruta Monjyo Kenkyūkai (ed.), *Nihon keihō sōan kaigi hikki*, vol.1 (Tokyo: Waseda daigaku shuppankai, 1976)).

reaction to a particular event by the Grand Council of State or the various ministries.¹⁹ It is clear from civil judgements of the period that decrees, proclamations and ordinances from some ministries could be utilised in judicial courts.²⁰ Many proclamations were issued between 1868 and the enforcement of civil code and commercial code in 1898 and 1899 respectively.²¹

Article 3 of Proclamation No.103 (*Dajōkan fukoku*, General Regulations towards Administration of Justice), announced on 8 June 1875, stipulated that there was a strict hierarchy pertaining between the usage of the different forms of law: the primary source of law was statutory law, the second was customary law and the third was equity law.²² Statutory law meant proclamations, edicts and ordinances from the Grand Council of State (*Dajōkan*) and the ministries. Customary law referred to those practices that had existed between the government and the people up until 1879 and had come to be seen as social customs or usages.²³ Equity law

¹⁹ According to Ishii, "the Central Administrative Council (gyōseikan)" would utilise the phrase "let it be decreed", and "the five Departments of Religion, Finance, Military Affairs, Foreign Relations and Justice as well as the prefectures would use the phrase "let it be proclaimed" (Ishii (trans. Chambliss), *Japanese Legislation in the Meiji Era*, pp.38-39).

²⁰ *Kujikata-osadamegaki* also had a lot of civil rules (Harafuji, *Keiji hō to minji hō*, p.34).

²¹ Although the civil laws and customs formed through the Tokugawa period were examined, compiled and published in 1878 and 1880 at the name of *Minji Kanrei Ruishū* and *Shōji Kanrei Ruishū*, these were not regarded as important by the government and did not seem to play an important role in the codification of civil laws. It is not yet clear whether these customs were utilised in civil justice during the early Meiji era.

²² Kenji Maki, "Meiji 8-nen minji saiban no gensoku", *Hōgaku ronsō* Vol.17, No.2 (1927); Sumio Ōkawa, "Meiji 8-nen Dajōkan fukoku dai 103-gō 'Saiban Jimu Kokoroe' no Seiritsu to Inoue Kowashi (1)-(3)", *Ritsumeikan hōgaku*, Nos.205=206/ No.227/ No.234 (1989-1994); Jūro Iwatani, "Kunrei wo aogu daishinin", in Jūro Iwatani, *Meiji Nihon no hōkaisyaku to hōritsuka* (Tokyo: Keio gijuku daigaku shuppankai, 2012 [1993]).

²³ Kazuhiro Murakami, "Saiban kijun to shitenō 'shūkan' to minji kanrei ruishū" *Dōshisya hōgaku* Vol.49, No.5 (1998), pp.291-294.

relates to a judge's assessment of fairness; in cases where no written statutory law and no customary law could be utilised in making decisions, judges used the French Civil Code or the draft version of Germany's civil law as equity law.²⁴ Evidence of this can be seen in judgements from the era and in other documents in which judges, who at the time served concurrently as court executive officers, recorded their early experiences. Kazuo Imamura has noted this widespread use:²⁵

Well before it was published some executive officers copied the Napoleonic Code, which had been translated into Japanese by Mitsukuri Rinshō [in 1869-1874], in order to utilise it in delivering their judgements. After publication, there were no judges who did without it.²⁶

The Edo-era practice of utilising unpublished laws may have prevented Meiji judicial officials from questioning the use of draft laws or foreign laws. For judges, law was not a contract or a catalogue documenting the respective rights pertaining between the state and the public, but rather a guide book to be consulted in order to reach the correct answer when resolving cases. As

²⁴ Hōsei daigaku (ed.), *Boasonādo tōmonroku* (Tokyo: Hōsei daigaku shuppankyoku, 1978), pp.22-26. Boissonade used the following words when he answered the question; *kanshū* for usage, *sadamaritaru shūzoku* for coutume, *jōgi* for equite, and *tenri* for droit naturel. When usage or coutume was contrary to equite or droit naturel, it could not be the reason for a judgment.

²⁵ Kazuo Imamura (1846-1891) was a member of the Iwakura mission and stayed in Paris to hear Boissonade's lectures at university. After coming back to Japan, he drafted the Civil Procedure Code and Civil Code.

²⁶ Cited from Kazuhiro Murakami, "'Meiji-ki ni okeru 'jōri' saiban to Furansu hō no eikyō", *Hōritsu ronsō* Vol.67, No.1 (1994), p.323.

discussed in Chapter 2 British precedents and the French civil code were utilised by judges in the 1880s, and in the 1890s the Civil and Commercial Codes of Japan were also employed in courts. However, this usage was unofficial; these codes had been enacted by the government just before the establishment of the Japanese parliament, and the latter body voted to postpone the codes' enforcement. Despite this postponement, the codes were being utilised in court during this period. In the early Meiji era judges believed that they required a written standard to reach a conclusion and deliver a judgement, but did not believe that these rules should be openly promulgated. Consequently, they did not deem it strange to use foreign laws in Japanese courts in order to deliver a justifiable and reasonable judgement. Until 1899, when systematised codes finally came into use, these sources of law were fundamental to judicial courts dealing with everyday civil and criminal cases.

Judges applied rules to the facts, and therefore traditionally enjoyed little discretion. The way in which judges interpreted the meaning of the laws and reached conclusions before delivering their judgements was known as the inquiry-order system (*ukagai-shirei saiban*).²⁷ This was a process of obtaining sanction from government executives through submitting draft proposals for

²⁷ Henderson defined '*ukagai*' as 'a request by subordinate officials to the senior council for approval of a proposed penalty to be imposed in a specific criminal case' (Henderson, *Conciliation and Japanese Law*, Vol.2 (Seattle, Wshington University Press, 1965), p.303). Also see Yūichi Ōhira, "Kinsei Nihon no '*ukagai* · shirei gata shihō'", *Ritsumeikan hōgaku* No.286 (2003), pp.862-786.

executive endorsement. If there was a questionable case judges would ask their court's chief judge, who would then write to their senior officers in the Ministry of Justice and other ministries for guidance on the rules and their application.²⁸

This inquiry-order system was commonly used by administrative officers and was characteristic of the Edo-era judicial system, which did not make a clear distinction between judicial and administrative power.²⁹ In the early Meiji period the answers supplied by the Ministry of Justice were cited by judges and were compiled by private publishers, former administrative officers themselves and others into books for the use of lawyers and other parties seeking to file actions.³⁰ This system therefore served to standardise judgements and extend the influence of the government on the interpretation of rules. Article 5 of Proclamation No.103 (8 June 1875), however, prohibited the citation of inquiry-orders in judgements as a source of law. Judges at local ward courts and district courts (and sometimes appeal courts) were henceforth unable to deliver their decisions based on earlier answers delivered to officers or court judges, whether formally or officially.

Moreover, Article 4 of Proclamation No.103 (8 June 1875)

²⁸ The Great Court of Cassation sent inquiries to the Ministry of Justice before delivering judgements. See Iwatani, "Kunrei wo aogu daishinin", *Meiji Nihon no hōkaisyaku to hōritsuka* (Tokyo: Keio gijuku daigaku shuppankai, 2012[1993]) pp.26-107.

²⁹ Yūichi Ōhira, *Meyasubako no kenkyū* (Tokyo: Sōbunsha, 2003).

³⁰ These books are included in *Kokuritsu Kokkai Toshokan Shozō Meijiki Kankō Toshō Shūsei: Hōritsu bun'ya* (Microfilm ed., Tokyo: Maruzen, 1971).

held that a previous judgement should not carry authoritative weight and that therefore judges could not refer to past decisions. Although at this time the Supreme Court (Great Court of Cassation, or *Daishin'in*) was already producing law reports (other courts were not yet), even these were not allowable as precedents in later judgements. As the quality of judgements could not be certified by the government due to the lack of capable judges, no judgements produced after Proclamation No.103 officially became law, or part of any law. It is clear that in the early Meiji era the status of ministry orders was higher than court judgements, and senior officers in the Ministry of Justice were held in higher esteem than judges in the judicial system.

The application of proclamations or edicts as written law, customary law and equity law for delivering judgements was challenging work for judges lacking Western legal training, and so the hybrid judicial system that emerged during the formative periods of the modern Japanese legal profession and court procedures, a system that combined adjudication and conciliation, was highly necessary.

2-2 Conciliation and Adjudication

There was a considerable difference in the volume of cases handled by the conciliation and adjudication. The traditional conciliation system was used in the early Meiji era to resolve the vast majority of day-to-day conflicts that occurred during the formative period of the newly-introduced Western judicial system; by contrast, the imported Western-style adjudication system dealt with a small number of civil and commercial disputes by delivering court judgments.

When they introduced Western-style trials the Meiji government and the Ministry of Justice also established a conciliation system that sought to continue the dispute resolution method in place since the Edo era. This meant that the relationship between the introduced Western adjudication system and the Edo-era-inspired conciliation system mirrored that pertaining between the advocates and the non-credentialed legal practitioners: the Western adjudication system and the advocates dealt with relatively few cases which were often highly specialised, whereas the conciliation system and the non-credentialed legal practitioners managed the vast majority of day-to-day cases.

The increasing demands placed on courts and their associated systems by those wishing to resolve disputes intensified the necessity to introduce and utilise a hybrid court system. The rapid Westernisation of Japanese civil procedures saw increasing numbers of local, routine cases, in particular small claims

lawsuits, being processed in Japanese courts. As a result of private individuals being able to bring their own actions, courtrooms were soon filled to overflowing.

As early as February 1872 Tokyo Court was considered “a whirlwind of business”; data compiled for this thesis has revealed how rapidly its caseload grew in the following years. Although the Ministry of Justice only began to compile judicial statistics in 1875 (and the data collected/presented was only standardised from 1878 onwards)³¹ some earlier data was available in the Justice Department Library, allowing Table 4-1 (below) to be completed, albeit in a fragmentary fashion. For an unknown reason the data for 1873 was split into two halves, but 1874’s data was collated onto one set of figures; data for January and February 1875 was missing entirely. Nevertheless, the table clearly shows just how rapidly the civil caseload at Tokyo Court increased during these years.³²

³¹ Reiji Hayashiya, Ikuso Sugawara, Makiko Hayashi (eds.), *Tōkei kara mita meiji-ki no minji saiban* (Tokyo: Shinzansya shuppan, 2005).

³² No.54 and No.73, *Shihōshō Nisshi*, Vol.16 [Meiji 8-nen 4-gatsu kara 9-gatsu] (Tokyo: Tokyo daigaku shuppankai, 1984); *Meiji 6-nen chōshōhyō* (Hōmu toshokan, H500-S1-27).

[Table 3-1] Civil Caseloads at Tokyo Court (1873-1875)

【Table 3-1】 Civil Caseloads at Tokyo Court (1873-1875)								
	New cases	Pre-existing cases	Settlement before trial	Settlement after trial	Judgement	Withdrawal	Transfer to another institution	Transfer to criminal court
1873 Jan-Jun	1,696	490	281	602		448	174	21
1873 Jul-Dec	1,045	1,500	865	1,052	4	958	261	17
1874 Jan-Dec	29,768	3,015	11,530	10,365	48	5,753	997	51
1875 Mar	6,546	5,904	1,016	2,916	1	1,427		5
1875 Apr	6,156	6,795	928	2,951	6	1,369		11

In 1873 the Tokyo Court had 2,741 new cases; in the first half of the year it had 490 pre-existing cases (i.e. cases carried over from 1872 or earlier) and in the second half of the year 1,500 pre-existing cases, some of which would have pre-1873 and some of which would have been from the first half of 1873. In 1874 there was a massive increase, with 29,768 new cases and 3,015 pre-existing cases. Between 1873 and 1874 new cases increased almost eleven-fold. The 1875 numbers are incomplete, but based on the totals for March and April the annualised figure may well have been around 2.5 times the total for 1874.

There were many kinds of lawsuits presented in courts in the early Meiji era but as shown in Table 4-1, even in March and April 1875, most cases ended in settlement (either before or after trial) or in withdrawal; there were only seven judgments (*saikyo*) given in this period, compared to almost 13,000 new cases. In May 1875 the government clarified that local ward courts had jurisdiction for civil cases in which the sum of the subject of

litigation was less than ten yen, as well as for criminal cases involving possible sentences of imprisonment for up to thirty days. Although these courts were already handling these types of cases, the official clarification seems to have jolted the local courts into action: as the number of new cases was continuing to dramatically increase a request was made in June 1875 by Yasukowa Matsuoka, the president of the Tokyo Court, to introduce conciliation (*kankai*) into the local ward courts. In order to reasonably and effectively control and reduce the caseload, the government declared that conciliation would be introduced in September in Tokyo Court and then expand to other courts through the year.³³ In fact, the procedures used in resolving small money claims via litigation before 1875 were quite similar to those used in conciliation from September of that year onwards.

The Ministry of Justice and the government wanted to relieve this pressure on local courts and so began to introduce conciliation as a means of resolving court cases, beginning with

³³ Makiko Hayashi, "Funsō kaiketsu seido keisei katei ni okeru kankai zenchi no yakuwari", *Handai hōgaku* Vol.46, No.6 (1997), pp.163-192.

Tokyo District Court.^{34 35} Conciliation was generally restricted to the Japanese parties directly concerned, to the exclusion of both foreign parties and legal representation for the Japanese parties. While the use of the conciliatory method for settling disputes has been interpreted as a manifestation of the Japanese cultural preference for 'harmony', even in conflict resolution, the purpose of introducing the conciliation procedure in 1875 was political or practical rather than cultural. Action was needed to cope with the flood of debt cases, flowing into the legal system after the Meiji Restoration. An informal, flexible and effective method of dispute resolution, combining auxiliary with formal litigation,

³⁴ Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan", in Arthur Taylor von Mehren (ed.), *Law in Japan: the Legal Order in a Changing Society* (Cambridge: Harvard University Press, 1963), p.53. According to Kawashima, *kankai* (literally, invitation to reconciliation 勧解) should be translated as conciliation. Included in *kankai* was the French concept of conciliation of 1790, and many scholars have used the term including Takeyoshi Kawashima, Dan Fenno Henderson and John O. Haley, although the recent work of Wilhelm Röhl chose mediation for *kankai* (cf. Wilhelm Röhl, "Law of Civil Procedure", in Wilhelm Röhl (ed.), *History of Law in Japan since 1868* (Leiden & Boston: Brill, 2005), p.665). Röhl explained *kankai* as follows: "A few pertinent comments should be made on the words. In Japanese there are several terms for amicable settlement. Before the restoration the words *naisai*, *wayo*, and *atsukai*, were in use. The expressions after 1868 in English translation have been defined by T. Kawashima, *Dispute Resolution in Contemporary Japan*, 1963, pp.50-57;--"'Reconciliation' and 'conciliation' mean the process by which parties to the dispute confer with each other and reach a point at which they can come to terms and restore or create harmonious relationships. Reconciliation is usually achieved with the help of a prominent member of the social group to which either party belongs. Conciliation is reconciliation through an outsider. Both events were extrajudicial arrangements. On the other hand, mediation means that a third party offers his good offices to help the others reach an agreement. Therefore, the word is used as a legal term; the mediator is the law court or a special institution under law. He continues to refer that arbitration is a stronger form of mediation insofar as the mediator is authorized to decide like a law court. He insists that the *kankai* should be translated as conciliation. However, we should think the historical back ground of *kankai*; the *kankai* was the translation of conciliation in French and many academics have used the word. In addition, the word mediation was utilised as a translation of *chôtei*" (*Ibid.*, pp.665-666 (n)24).

³⁵ "Kaku ku saibansho shôtei", *Dajô ruiten*, dai 6 rui dai 2 hen (meiji 4-10 nen), dai 17 kan kansei 4 bunkanshokusei 4, 1871-1877 (Kokuritsukobunshokan 2a-009 239100-33); Makiko Hayashi, "Meijinkinihon Kankaiseido ni arawareta funsôkaiketu no tokuchô", in Yoshihiko Kawaguchi (ed.), *Chôtei no kindai* (Tokyo: Keisô shobô, 2011), pp.149-198.

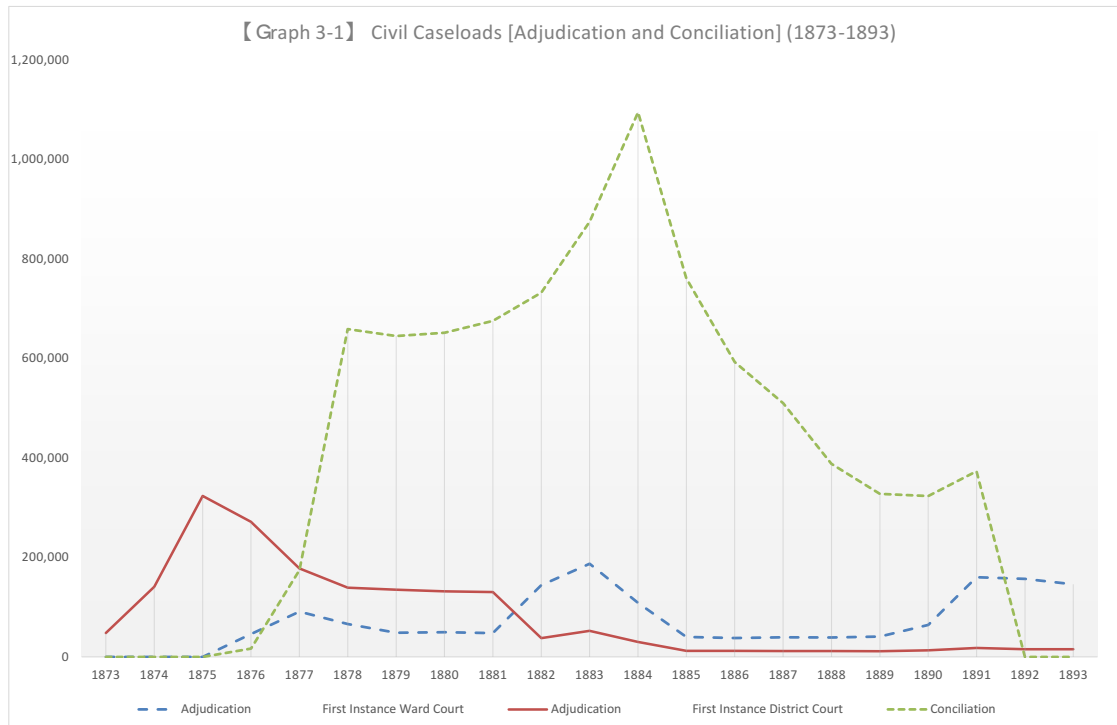
was the only feasible option for the government that enabled it to avoid the risk of social disorder; it was also essential to introduce a dispute resolution system that would be recognised by the West as befitting a modern nation.

The next table (Table 3-2) and the graph created from it (Graph 3-1) show the number of civil cases between 1873 and 1893 dealt with by adjudication in the ward courts and district courts (i.e. the two first instance courts) and the number dealt with by Conciliation (all of which were in ward courts). In 1875 and 1876 the first instance district courts dealt with a massive number of cases, 323,588 and 271,397 respectively. These figures were far beyond courts' processing capacity, and as a result many suits were not processed promptly.

[Table 3-2] Civil Caseloads [Adjudication and Conciliation] (1873-1893)

【Table 3-2】 Civil Caseloads [Adjudication and Conciliation] (1873-1893)			
	Adjudication First Instance		Conciliation
	Ward Court	District Court	
1873	—	47,850	—
1874	—	140,993	—
1875	—	323,588	—
1876	45,913	271,397	16,792
1877	90,843	177,772	174,329
1878	66,088	139,205	658,872
1879	48,535	135,009	644,997
1880	49,659	131,813	651,604
1881	47,609	130,406	675,218
1882	144,108	37,531	731,810
1883	187,243	52,432	874,739
1884	108,439	30,158	1,094,659
1885	40,065	11,946	760,992
1886	37,847	12,073	592,588
1887	39,405	11,603	509,915
1888	38,970	11,737	388,225
1889	40,637	11,433	327,600
1890	64,166	13,264	323,422
1891	160,246	18,022	372,907
1892	156,780	15,390	—
1893	145,888	15,525	—

[Graph 3-1] Civil Caseloads [Adjudication and Conciliation]
(1873-1893)



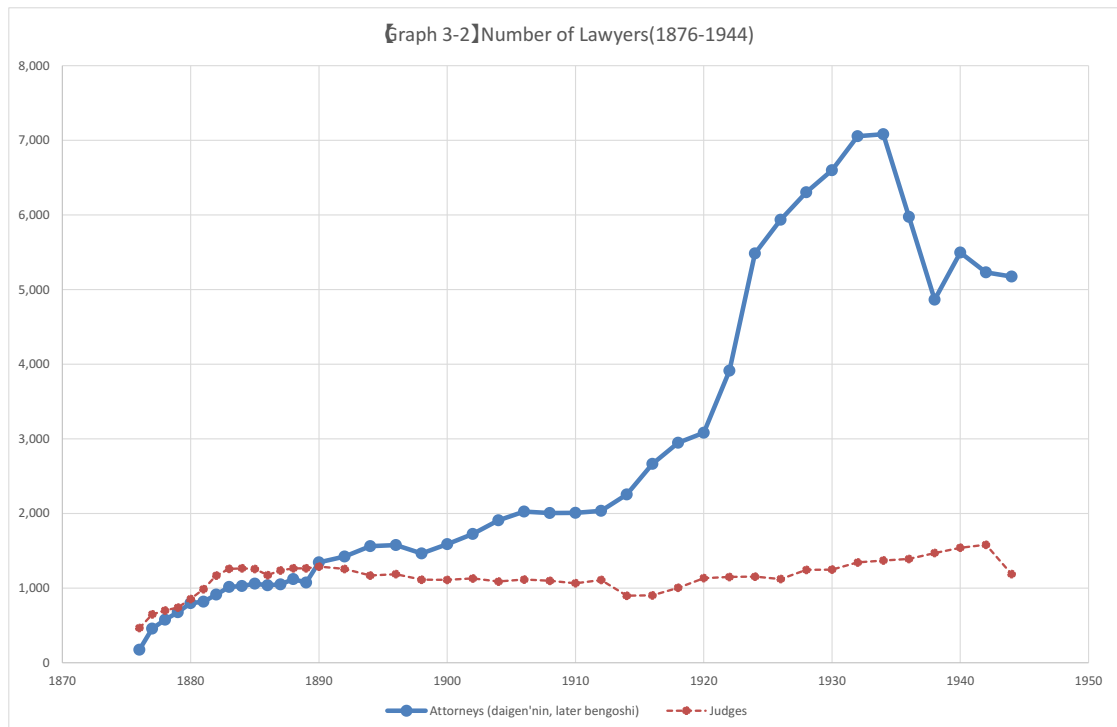
2-3 Number of Qualified and Non-credentialed Legal Practitioners

This section will estimate the number of judges, attorneys (legal advocates) and non-credentialed legal practitioners in Japan from the early Meiji era up to the 1940s.

Graph 3-1 shows the number of judges and attorneys (legal advocates) in Japan from 1876 to 1944. As the aim of this thesis is to discuss the construction of the legal profession, annual totals are shown for the years 1876-1890 and biennial totals thereafter. Qualification for legal practitioners was first instituted in 1876; figures before that year cannot be reliably estimated due to incomplete statistical reports as well as the

lack of any qualification examination.

[Graph 3-2] Number of Lawyers (1876-1944)³⁶



³⁶ Graph 3-1 was collated from Kahei Rokumoto, *Nihon no hō shisutemu* (Tokyo: Hōsō daigaku kyōiku shinkōkai, 2000), pp.130-131; Reiji Hayashiya, Ikuko Sugawara, Makiko Hayashi (eds.), *Tōkei kara mita meijiiki no minji saiban* (Tokyo: Shinzansya, 2005); Tadafumi Kuroda, “Hōsō kyōiku · hōshoku shūnin danjo dōken-ka no hikakuhōshi (2)”, *Kōnan Hōgaku* Vol.47 No.2 (2006), pp.159-222.

[Table 3-3] Number of Lawyers (1876-1944)

【Table 3-3】 Number of Lawyers (1876-1944)		
	Attorneys (daigen'nin, later bengoshi)	Judges
1876	174	466
1877	457	648
1878	577	701
1879	677	740
1880	799	854
1881	818	986
1882	914	1,169
1883	1,015	1,258
1884	1,029	1,266
1885	1,060	1,257
1886	1,037	1,174
1887	1,051	1,237
1888	1,120	1,265
1889	1,075	1,266
1890	1,345	1,289
1892	1,423	1,257
1894	1,562	1,169
1896	1,578	1,188
1898	1,464	1,113
1900	1,590	1,111
1902	1,727	1,130
1904	1,908	1,089
1906	2,027	1,116
1908	2,006	1,098
1910	2,008	1,066
1912	2,036	1,109
1914	2,256	898
1916	2,665	903
1918	2,947	1,004
1920	3,082	1,134
1922	3,914	1,150
1924	5,485	1,155
1926	5,936	1,121
1928	6,304	1,245
1930	6,599	1,249
1932	7,055	1,345
1934	7,082	1,370
1936	5,976	1,391
1938	4,866	1,470
1940	5,498	1,541
1942	5,231	1,581
1944	5,174	1,188

As is apparent from Graph 3-2 (and Table 3-3), from 1876 until 1889 there were fewer attorneys than judges. This period was the formative era of the modern judiciary system in Japan; Western-style court legislation, entitled the Organization and Rules for the Supreme Court (Daishin'in) and Lower Courts, was enacted in May 1875. This was the first establishment of a national judiciary organisation that was independent from governmental administrative control. The first Western-style Criminal Code was enacted in 1880 and enforced from 1882, and the new Westernised Code of Civil Procedure and the Code of Criminal Procedure were enforced from 1891.³⁷ Throughout this formative era in the establishment of Japan's legal system, judges outnumbered attorneys.

The Ministry of Justice fairly consistently added approximately a hundred qualified legal advocates to the profession per year from 1877 to 1883, although there was no attempt to match the number of judges, which was also increasing steadily through this period. One of the reasons for the increase of attorneys up until 1883 was the codification from 1874 of the first Western Criminal Code and Criminal Procedure Code; these were finally enacted in 1880 and enforced from 1882.³⁸ Article 381 of the Criminal Procedure Code stipulated that a judgement in a criminal court is rendered invalid when reached without the

³⁷ Ryōsuke Ishii (trans. Chambliss), *Japanese Legislation in the Meiji Era*, p.283.

³⁸ No.36 proclamation (Dajōkan Fukoku [Keihō kaitei]), 17 July 1880.

defendant having recourse to a counsel. On 9 January 1882 however, just 8 days after both codes came into effect, the government and the Ministry of Justice enacted a proclamation which made Article 381 invalid; in courts without any registered advocates and therefore without defendants' counsels, such judgments would not become invalid. The change in government policy in effect meant that legal advocates were not necessary for every regional court case; this is one of the reasons why the increase in attorney numbers slowed.

Graph 3-2 also shows that the legal advocate population grew explosively through the 1920s. Reforms in the legal profession qualification process in 1923 which unified the legal advocate and judge/prosecutor examinations resulted in a number of potential candidates not being eligible to take the new exam; alternative routes for such individuals were also introduced, with bar examinations being held twice a year in 1921 and 1922. This bar examination was provisionally retained until the 1940s, long after the unified legal examination had been introduced. The details of the legal profession in the 1920s will be discussed in Chapter 6.

Let us return again to the Meiji era. In 1876 there were only a very few legal advocates: there were less than two hundred people in total. However, the demand from potential litigants for legal services was very much greater; the next section will analyse the nature and extent of this demand in greater detail.

2-4 Demand for Non-credentialed Legal Practitioners

Previous research by Seiichi Hashimoto has revealed that some non-credentialed practitioners were active outside courts after 1876, for example serving criminal defence functions, working for lawsuit agencies or as legal consultants, and they have been found to have been very active in taking advantage of their network of contacts in local authorities.³⁹ Furthermore, more recent research of Hashimoto, Misaka and others has also shown that non-credentialed legal practitioners appeared *before courts* as proxies and advocates even after 1876.⁴⁰

However, neither the number of non-credentialed practitioners appearing in court nor the details of their roles have been sufficiently-investigated.⁴¹ Graph 3-2 shows the balance between qualified advocates on the one hand and non-credentialed legal practitioners who appeared as proxies and advocates in court on the other. Table 3-3 shows the number of qualified and non-

³⁹ Seiichi Hashimoto, *Zaiya "hōsō" to chiiki shakai* (Kyoto: Hōritsu bunkasha, 2005). See also Masashi Yoshida, *Kujiyado · gōyado kara daisho · daigen'nin heno tenkan no katei* [Monbushō kagaku kenkyūhi hojokin kenkyū seika hōkokusho: Heisei 13-nendo~Heisei 15-nendo] (2004); Masashi Yoshida, "Sendai jōka no goyō yado", in Fujita Satoru (ed.), *Kinsei hō no saikentō: Rekishigaku to hō-shigaku no taiwa*, (Tokyo: Yamakawa shuppansha); Masuda, Osamu (2006), "Hiroshima daigen'nin kumiai enkakushi: fu, Hiroshima shishin saibansho no kankyo daisho'nin", *Shūdō hōgaku* Vol.28 No.2, pp.721-913.

⁴⁰ Seiichi Hashimoto, "Daishin'in hōtei ni okeru daigen'nin · Dainin: 1875-nen~1880-nen", *Shizuoka daigaku hōsei kenkyū* Vol.14, Nos.3=4 (2010), , pp.67-96; Yoshihiro Misaka, "Kindai Nihon no chiiki shakai to bengoshi: 1900-nendai no Shigaken'iki wo daizai to shite", *Kwansei gakuin daigaku hō to seiiji* Vol.62, No.1-II, 2011, pp.173-256; Yoshihiro Misaka, "Meiji matsu·Taishoki Kyojichiiki niokeru Bengoshi to hi-bengoshi:: Zoku · kindai Nihon no chiiki shakai to bengoshi", *Handai hōgaku* Vol.63 No.2, 2013; Yoshihiro Misaka, "Meiji zenki minji hanketsu genpon ni arawareta dainin: 1877~1890-nen no Keijihan chiki no dainin no jirei", *Handai hōgaku* Vol.63, Nos.3=4 (2013), pp.889-921.

⁴¹ Seiichi Hashimoto, "Daishin'in hōtei ni okeru daigen'nin · Dainin: 1875-nen~1880-nen", 2010, pp.67-80 for a discussion on the number of non-credentialed practitioners appearing before the Supreme Court from 1875 to 1880.

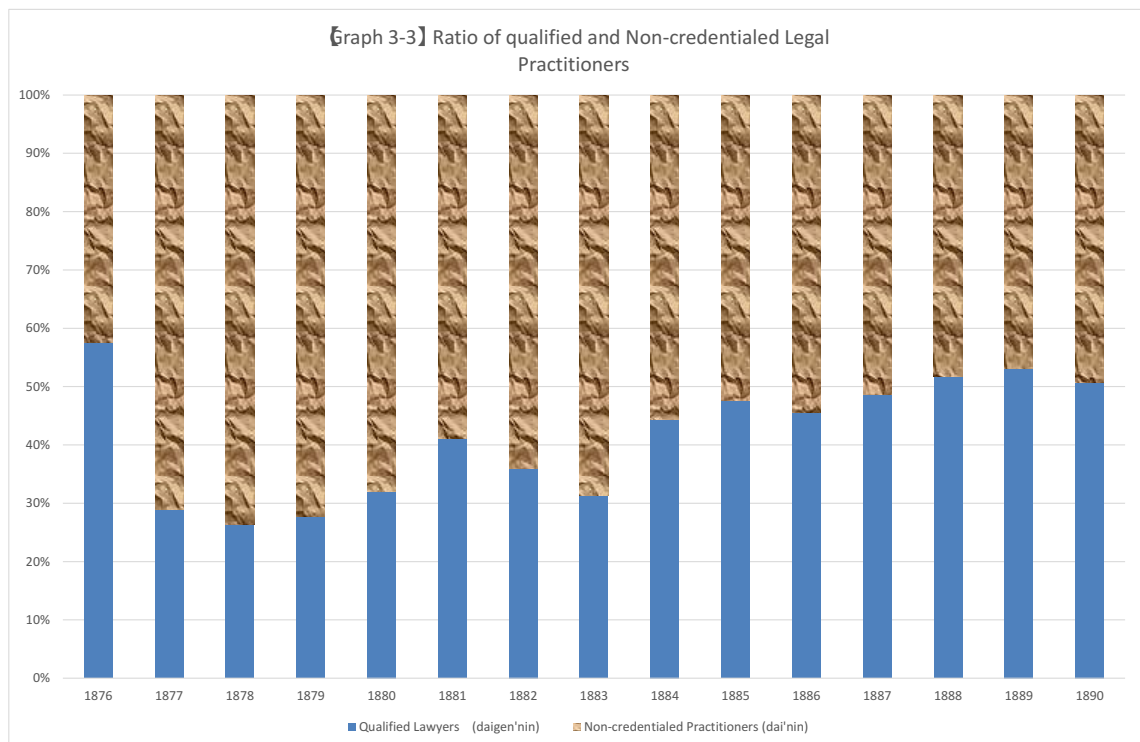
credentialed legal practitioners appearing in civil judgements between 1876 and 1890, as well as the ratio between the two and the total number of judgments.⁴² Although caution must be taken with the actual figures, as undoubtedly many names would have appeared more than once in civil judgements in any given year, it can be reasonably surmised that as this would apply both to the qualified legal advocates and non-credentialed legal practitioners, the *ratio* between the two will be broadly accurate. It has been tabulated from the Database of Civil Judgement files held by the International Research Center for Japanese Studies. I attempted to calculate the numbers of qualified legal advocates and non-credentialed legal practitioners in lower courts such as Ward Courts, District Courts and Appellate Courts. Graph 3-2 shows the ratio of qualified and non-credentialed legal practitioners. The graph makes it very clear that the percentage of lawyers who were non-credentialed was consistently high from 1876 (or arguably 1877) to 1890.

⁴² Graph 3-2 shows data between 1876 and 1892, i.e. from when the qualification examination started to the last 'daigen'nin year' before the enactment of the 1893 Attorney Act.

[Table 3-4] Number of Qualified and Non-credentialed Legal Practitioners (1876-1890)

Table 3-4] Number of Qualified and Non-credentialed Legal Practitioners (1876-1890)				
	Qualified Lawyers (daigen'nin)	Non-credentialed Practitioners (dai'nin)	Ratio	Number of Total Judgements
1876	937	690	0.74	2,609
1877	1,881	4,624	2.46	9,397
1878	2,740	7,641	2.79	13,303
1879	4,413	11,478	2.60	19,241
1880	6,922	14,668	2.12	27,142
1881	10,119	14,515	1.43	34,316
1882	13,082	23,242	1.78	53,426
1883	16,252	35,652	2.19	74,745
1884	14,249	17,906	1.26	53,527
1885	7,408	8,160	1.10	21,900
1886	7,098	8,470	1.19	21,225
1887	9,106	9,609	1.06	24,771
1888	11,448	10,676	0.93	29,287
1889	11,932	10,569	0.89	31,420
1890	13,231	12,825	0.97	39,773

[Graph 3-3] Graph 3-3 Ratio of qualified and non-credentialed legal practitioners (1876-1890)



An 1872 edict listed the names of the various legal occupations and their responsibilities.⁴³ Legal practitioners were termed *daigen'nin*, which directly translates as 'those who speak out as substitutes or representatives for clients'. After the Regulations for Legal Advocates (*daigen'nin kisoku*)⁴⁴ were introduced in 1876 this term was only used by qualified lawyers; those practitioners who remained non-credentialed were required to use the term *dainin*.⁴⁵ The provisos in the preamble to the Regulations for Legal Advocates stipulated that if there was no legal advocate or the parties could not appear in court through illness or an accident, the parties could ask for their relatives to appear in court on their behalf; if this was not possible, the parties could ask for a 'proper proxy' (reasonable proxy or agent; *sōtō no dainin*) to act on their behalf. In the same year the government introduced the first governmental examination for the legal profession, enacted in order to control the quality of legal practitioners. Graph 3-3 and Table 3-4 show that from 1876 until 1890 non-credentialed legal practitioners appeared more frequently than their qualified peers in civil judgements. The numbers reflect the fact that following the introduction of the new governmental qualification non-credentialed legal

⁴³ The Judicial Staff Regulations and Operating Rules (Shihō Shokumu Teisei) [Edict Unnumbered (Dajōkan Tatsushi), the Grand Council of State (3 August 1872)].

⁴⁴ Edict Kō No. 1 (the Regulations for Legal Advocates), Ministry of Justice, 22 February 1876.

⁴⁵ Okudaira, *Nihon bengoshi shi*, pp.82-138. (An 1873 edict declared that non-credentialed lawyers were to be called *dainin*).

practitioners could not use the term legal advocate (*daigen'nin*). Even after the introduction of the Regulation for Legal Advocates (*daigen'nin kisoku*) in 1876 and its revision in 1880 (*kaisei daigen'nin kisoku*), the number of non-credentialed legal practitioners remained higher than that of qualified legal advocates until 1888, and only in 1891 did the number of advocates first greatly exceed that of non-credentialed practitioners.

Moreover, it is very difficult to ascertain whether a particular proxy in court was an occupational but non-credentialed agent (legal practitioner); the proxy might have been a relative or manager of the party. Hashimoto⁴⁶ reasons that one way to investigate whether proxies appearing in judgements were qualified legal advocates or not is firstly to exclude those proxies who only appeared once in judgements, and secondly to examine proxies and their cases in detail to establish whether they had a special relationship (such as a relative or an employee) with the party they were representing; if so, they should be excluded from the list of non-credentialed agents (legal practitioners). Although Hashimoto only looked at Supreme Court figures, and only for the limited period of 1878-1882, he nevertheless found a considerable number of non-credentialed agents appearing in legal judgements, and therefore surmised that their number exceeded that of qualified legal advocates. Building on Hashimoto's research, this

⁴⁶ Seiichi Hashimoto, "Daishin'in hōtei ni okeru daigen'nin · dainin: 1875-nen~1880-nen", *Shizuoka daigaku Hōsei kenkyū* Vol.14 Nos.3=4 (2010), pp.67-96.

thesis has found that the same held true in lower courts too, and throughout the period 1876-1892.

The Meiji government sought to limit the numbers of qualified legal advocates. This was for two reasons: firstly, it was keen to maintain the quality of these lawyers and protect their high reputation, but secondly the government was concerned that qualified lawyers could lead social protest movements and agitate for change in society. Therefore, despite ever-increasing demand for legal services, the government determined that non-credentialed legal practitioners were a necessary evil that allowed them to restrict the total number of qualified legal advocates. Furthermore, as there were no penalties or restrictions limiting the appearances of uncertified proxies and advocates in court, the number of non-credentialed legal practitioners appearing in judgments showed no signs of decline.

It is difficult to clarify the actual number of non-credentialed legal practitioners who conducted legal practices in and out of court. However, some local reports show that there were more than 10 times as many non-credentialed legal practitioners as there were qualified legal advocates, although this must have varied by region. For example, in 1883 there were 21 qualified legal advocates and 224 non-credentialed legal practitioners in courts in the Mito District Court jurisdiction.⁴⁷

⁴⁷ Masao Gabe (ed.), *Meiji 16-nen, Meiji 17-nen, chihō junsatsu fukumeishi fukumeisho*, vol.2 (Tokyo: Sanichishobō, 1981), pp.913-914.

In Tochigi Prefecture there were 16 qualified legal advocates and 300 non-credentialed legal practitioners⁴⁸, and in Osaka Prefecture there were 1000 non-credentialed legal practitioners in 1884.⁴⁹ In the 1880s there seem always to have been at least twice as many non-credentialed legal practitioners as legal advocates, and sometimes as many as 10 to 20 times, although as stated above it depended on regional circumstances. Table 3-2 showed that the number of non-credentialed legal practitioners' names appearing in judgements halved from 1883 to 1884 and halved again from 1884 to 1885, even though they were still appearing in rulings in numbers comparable to those of legal advocates as late as 1890. The decline was for three main reasons. Firstly, there was a reduction in the number of rulings in 1884 due to an easing in the recession of the early 1880s (weak economic conditions were always associated with rising numbers of court cases). Secondly, the number of rulings in 1884 also dropped due to the decline in activity of the political and social protest movements from their 1883 peak. Finally, there was then a further decline in rulings in 1885 due to a rise in court fees in 1884.

From 1891 new civil procedures and codes were enforced. However, the Attorney Act of 1893 did not impose penalties on non-credentialed practitioners appearing as counsels at court or conducting other court activities. As a party could appear in

⁴⁸ *Ibid.*, p.1003.

⁴⁹ 17 February 1884 *Osaka Asahi Shinbun*.

court without counsel, with the permission of the court family members or relatives of such a party could also appear, and the same held true for an employee or company manager. For this reason, it is difficult to pinpoint exactly when occupational non-credentialed legal practitioners ceased appearing in court.⁵⁰ However, we can estimate that they stood at the bar until approximately 1896. Finally, in 1933, Article 1 of the Regulations for the Conduct of Judicial Business (Hōritsu Jimu Toriatsukai no Torishimari Kisoku) provided that non-credentialed legal practitioners could not act for their clients in judicial courts.⁵¹

From the 1870s until the early 1890s non-credentialed legal practitioners thus helped build a Westernised judicial system by dealing with day-to-day disputes both in and out of court. In the next section we will analyse individual conciliation cases by examining the activities of these legal practitioners.

⁵⁰ 6 February 1884 and 13 February 1884 of Osaka AsahiShinbun noted that Osaka District and Kyoto District Courts decided not to permit using the non-credentialed legal practitioners.

⁵¹ Law No.54, 1 May 1933. See also Practicing Attorney Law (Law No. 53, 1 May 1933).

Section 3: Conciliation Procedure

3-1 Legal Practitioners and the Conciliation Procedure

In this section the resolution of disputes through conciliation (*kankai*) will be examined. Conciliation proceedings commenced when one party submitted an application to court and another party was summoned to appear. The judge in charge would try to settle their disputes in court in line with the actual circumstances of the parties, but without being bound to the law.⁵² Unlike under the adjudication procedure, plaintiffs could bring their disputes to court for conciliation without presenting written petitions or any documentary evidences. Conciliation had an appearance rule that required the parties to attend court in person unless they were ill or injured, in which case they could utilise relatives, employees or 'a proper proxy' (*sōtō no dainin*) as a representative.⁵³ There were three possible end results of the process, namely settlement, withdrawal or failure; this last result could lead to one of the parties submitting their petition to a court of first instance.

Conciliation (*kankai*) drew to a considerable degree on French legislation enacted in 1790.⁵⁴ When the introduction of

⁵² Articles 6-8, Ordinance No.15 (Saibanshichō karikisoku), Ministry of Justice, 28 December 1875; Articles 6-9, Ordinance No.66 (Kusaibansho kairikisoku), Ministry of Justice, 27 September 1876.

⁵³ Articles 9, Ordinance No.66 (Kusaibansho kairikisoku), Ministry of Justice, 27 September 1876.

⁵⁴ C.H. van Rhee, "Introduction", van Rhee(ed.), *European traditions in civil procedure* (Antwerpen: Intersentia, 2005), p.186 explained conciliation in the European context: "In the eyes of Voltaire, a proto-type of court-related conciliation could be found in the town of Leiden in the Dutch Republic, where so-called 'peacemakers' had been active since the sixteenth century. The French type of preliminary conciliation, which found its origin in a 1790 Decree, is

conciliation was being considered in Japan the French system was translated and examined. Indeed, the fact that the French code of civil procedure included a conciliation procedure⁵⁵ and that Boissonade promoted conciliation in his teaching at the Ministry of Justice must have come as a great relief to those in Japan who were promoting the adoption of a Westernised judicial system; its similarities to Edo-era dispute resolution and the informality of the resolution procedure promised to make its introduction far less problematic than it might otherwise have been. In fact, despite its French influence, the introduction of the conciliation procedure into Japan during the early legal modernisation period served as a buffer from the impact of the many other legal changes emanating from Western-based systems.⁵⁶

Former research has criticised conciliation (*kankai*) for its highlighting of the Japanese tendency to treat full litigation as something to be avoided if at all possible; the existence of the conciliation system supports a view of the Japanese as being reluctant litigants,⁵⁷ and its critics argue it became an

often associated with this Dutch model. This type of conciliation was a prerequisite for bringing most types of actions before a court of law and, therefore, it should be classified as compulsory conciliation. Partly because it was also incorporated in the French 1806 Code (...), preliminary conciliation before the Justice of the Peace was exported to many of the countries that came under Napoleon's rule."

The very similar story was told to the Japanese Authorities in Boissonade's lecture as of May 1874, when he explained article 59 of the French 1806 Code ("Soshōhō kaigi hikki" Vols.1-5 (Kokuritsu Kōbunshokan Naikakubunko, Kokusho 188-272)).

⁵⁵ Aritsune Katsuta, "Funsō shori hōsei keiju no ichi danmen: Kankai seido ga imisuru mono", *Kokusai hikaku hōsei kenkyū* No.1 (1990), pp.41-42.

⁵⁶ Makiko Hayashi, "Funsō kaiketsu seido keisei katei ni okeru kankai zenchi no yakuwari", *Handai hōgaku* Vol.46, No.6 (1997), pp.172-173; *Soshōhō kaigi hisski*, Vols. 1-5 (Kokuritsu Kōbunshokan Naikakubunko, Kokusho 188-272). The meeting of drafting civil procedure code held from 10 April 1874 until 30 April 1875.

⁵⁷ According to Dan Fenno Henderson, it was said that "it may be a tribute to

inhibiting factor in the nationwide penetration of Western-style trials.⁵⁸ I disagree with this criticism, as it seems to ignore the fact that for the first time ordinary people could instigate litigation on their own without being obliged to seek permission from town or village heads; such people brought a huge number of cases to court, as discussed in Section 1 of this chapter.

In this section the way in which conciliation functioned as a form of dispute resolution and the legal practitioners who made use of this system on behalf of their clients will be investigated in detail. This will enable clarification of the roles played by conciliation, firstly as a tool in enabling Westernisation of the judicial system, and secondly as a means for ordinary, and crucially, illiterate people, to resolve their disputes in court. In addition, this section will examine the differences between qualified and non-credentialed legal practitioners in conciliation.

The hybridised dispute resolution system that emerged in Japan established a back-and-forth procedure between the three

the efficiency of shogunal repression that the people were so docile and conciliatory, rather than evidence that they were naturally not litigious, and therefore sought amicable processes for solution of disputes" (D.F. Henderson "Some Aspects of Tokugawa Law", *Washington Law Review* Vol.27, No.1 (1952), p.98); Also see, Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan", Arthur Taylor von Mehren (ed.), *Law in Japan: The Legal Order in a Changing Society*, (Cambridge, Mass.: Harvard University Press, 1963), pp.52-53.; Dan F. Henderson, *Conciliation and Japanese Law: Tokugawa and Modern* (Seattle: University of Washington Press, 1965).

⁵⁸ Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan", Arthur Taylor von Mehren (ed.) *Law in Japan: The Legal Order in a Changing Society* (Cambridge, MA.: Harvard University Press, 1963), pp.41-72, esp. pp.52-53. For legal-historical understanding of Kawashima's these, also see Nobuyoshi Toshitani, "Japan's Modern Legal System: Its Formation and Structure", *Annals of the Institute of Social Science*, Vol. 17 (1976), pp. 1-50.

processes of out-of-court mediation, conciliation in court and litigation (adjudication). Once a case is filed in court in the modern judicial system of dispute resolution it should progress and conclude there, in accordance with defined formal procedures. The Meiji-era dispute resolution procedure, however, did not divide into court and out-of-court procedures neatly. The following cases involved a combination of court conciliation and out-of-court mediation. As conciliation didn't require written petitions or judgements there are no formal or official historical documents, and so I have drawn from conciliation cases recounted in newspaper articles from the period.

One newspaper report discusses a case in Nishiōji, Shiga Prefecture, in which a 22-year-old man (Tatsuo) raised a petition instigating the conciliation procedure in an attempt to improve relations between his wife and himself. The petition was against his wife and mother-in-law, who happened to be his adoptive mother. Tatsuo had been adopted by a family when he was seven years old on the condition that he would marry their daughter (Yone) and stay with them in the family home once married. Although Tatsuo and Yone had got married the previous year, Yone had refused to consummate the marriage and dealt with him as if they were unrelated. He had become angry and submitted a petition for conciliation, stating that "If Yone dislikes me so much, please persuade her to divorce me and to go away somewhere and marry another person", to which the mother (-in-law) had answered "No.

Though what Tatsuo said sounds reasonable, I cannot give my daughter Yone away in marriage as our ancestral blood relationship would then cease to exist. I can disown my adopted son and send him away, but cannot allow my daughter to leave this house." This case was thus an example of what was known in conciliation courts as an "away or stay" quarrel. A celebrated Shiga lawyer, Yujirō Ka'no, arbitrated in the case. He told Tatsuo that "It is difficult for the authorities to deal with such a matter, in addition it is a shame to sue a person who has at least the name of your mother. Conversely, Yone, it is unreasonable for you not to sleep in the same bed with him, having had the wedding ceremony".⁵⁹ The newspaper report notes that Ka'no arranged a settlement by persuading both parties to begin sleeping together from the New Year onwards.⁶⁰

Private booklets were published during the period that sought to provide guidance to novice petitioners involved in conciliation; appropriate wording for withdrawals, for example, included "as I (petitioner) have not investigated *such and such* and there are also disadvantages..."⁶¹ and "as the defendant was absent during the dates of conciliation"....⁶² In actuality, in some cases petitioners and defendants reached private settlements outside court and the petitioners agreed to withdraw their

⁵⁹ Author's translation

⁶⁰ *Yomiuri shinbun*, 4 January 1880, p.3.

⁶¹ Masaki Murata (ed.), *Kankai shoshiki binran* (held by National Diet Library; YDM30358. Nara: Heizō Takahashi and Sakujiro Sakata, 1877), pp.8-9.

⁶² Hironari Fukuoka, *Kankai hitori annai: Ichimei kankai negai shoshiki* (held by National Diet Library; YDM36626. Osaka: Naokichi Takahashi, 1882), pp.7-8.

petitions from conciliation court.

During court conciliation procedures defendants still sometimes asked petitioners, with the judge's knowledge, to cooperate in out-of-court mediation, as is documented in a defendant's words from an 1879 report:

"As I am a teacher of a public school as well as a proxy (non-credentialed legal practitioner), it would be dishonourable to be sued in conciliation concerning the unpaid charge for rice....I beg you to please withdraw this case". [The petitioner then agreed to withdraw the case without requiring a new contract]⁶³

If a settlement could be reached outside conciliation court the case might be withdrawn. In such cases both qualified and non-credentialed legal practitioners played a key role in reaching a compromise. It is difficult to tell whether the above case ended in withdrawal or in a conciliation court settlement, because when a case reached an out-of-court settlement during conciliation proceedings both parties could then come to court and file the settlement. The first case recounted above however (unconsummated marriage) seems to have been a withdrawal made for two reasons, firstly in order to avoid suing the plaintiff's mother (-in-law) and secondly on the grounds that there was no merit in either party reporting the settlement to court; cases reporting their settlements to court were basically committing any agreements made

⁶³ *Yomiuri shinbun*, 11 May 1879, p.2.

to writing for authentication.

Another interesting case was that of the new commoners (former untouchables) of Shizuoka Prefecture who were refused permission to use a public bath. These commoners and their legal advocate Takayoshi Takada first submitted their case to the Shizuoka District Court. Conciliation, or at least attempted conciliation, was mandatory at this time, meaning that the case was first dealt with in a conciliation court, but this first stage ended in failure on 4 September 1888. The plaintiffs and their legal advocate then decided to sue the bathhouse owners and the case moved to a full trial.⁶⁴ However, on 19 September 1888 the case was dismissed; although the Shizuoka District Court held a hearing with both parties in attendance, the court pointed out that there were deficiencies in the procedure and rejected the complaint.⁶⁵ In his dismissal of the petition, Judge Nakagawa told the plaintiffs' legal advocate Takayoshi Takada and the defendants' legal advocate Yasushi Endo that because the accused bath owners were each independent businesses, it was against the law for all four of them to be co-defendants.⁶⁶ The plaintiffs then brought a new petition against 11 bath owners to the Shizuoka District Court on 16 October 1888.⁶⁷ This case went to conciliation during which out-of-court arbitration led by a celebrated arbitrator, Nobuyoshi

⁶⁴ *Eiri Tōkai shinbun*, 4 September, 1888.

⁶⁵ *Eiri Tōkai shinbun*, 21 September, 1888.

⁶⁶ *Shizuoka Taimu shinbun*, 21 September, 1888.

⁶⁷ *Eiri Tōkai shinbun*, 17 October, 1888; *Shizuoka Taimu shinbun*, 21 October, 1888.

Kobayashi, was attempted. This however didn't go well, so on 1 December 1888 Judge Odagiri summoned the plaintiffs, defendants and arbitrator as witnesses in order to ask the defendants why they had refused to allow the new commoners to access the public baths' facilities. The defendants' three representatives could not answer the questions immediately and asked the judge to postpone the hearing. The judge concluded that the hearing had little point if the representatives could not answer the questions, and so summoned all 11 defendants to re-appear in court on 3 December.⁶⁸ A dozen or so conciliation sessions followed, resulting in a conclusion on 17 December that the owners had lost the case and were to give a back-washing service without charge whenever the plaintiffs came for a bath, on the grounds of negligence in refusing to admit the plaintiffs to their baths.⁶⁹ The agreement was signed by both parties on 19 December and consisted of the following three terms:

1. Bathhouse owners who have signed this agreement will not bar the new commoners of the town from future bathing, and the new commoners of the town are free to bathe at any time at the same fee as other guests during business hours.
2. Bathhouse owners who have signed this agreement will not reject providing a back-washing service without charge

⁶⁸ *Shizuoka Taimu shinbun*, 2 December, 1888. At the hearing, the Judge asked the arbitrator about the facts that he had already made clear, and then he asked the three defendants the reasons why they refused to let the plaintiff to use a public bath.

⁶⁹ *Tokyo Asahi shinbun*, No.1212, 12 December 1888.

whenever the new commoners of the town (the plaintiffs) come for a bath....

3. Claims for considerable damages are permissible against any person who causes a dispute in violation of this agreement.⁷⁰

Conciliation differed greatly from trials and presented a solution that lacked the legal weight of a conclusive trial judgment. However, although the above case showed that conciliation didn't usually impose punitive economic costs upon defendants, it could require them to meet specific measures, for example in this case regarding the requirement to provide backwashing services to the petitioners. Dispute resolution via conciliation was a continuation of the Edo-era practice known as 'Ōoka sabaki' (judicial decision made with human kindness and warmth in a fair manner); both practices tried to achieve reasonable and practical solutions to cases, irrespective of what the law might actually say. Another feature of such cases was that the legal advocates involved were often well-known; in the bath-house case for example the plaintiff's advocate was particularly renowned, as he was the president of the legal advocates association in Shizuoka Prefecture, although an arbitrator, Nobuyoshi Kobayashi, was also involved in trying to settle the case out-of-court during the conciliation proceedings.

⁷⁰ *Shizuoka Taimu shinbun*, 23 December 1888.

There are a number of similarities between the first and third cases discussed above (unconsummated marriage and bathing refusal); for example, they both went through conciliation proceedings in court but both were ultimately resolved out of court by arbitrators, not by legal advocates. Although it's unclear whether the second case discussed above, that of the rice charge, also involved an arbitrator, the case was withdrawn from court and the parties to the case tried to reach a settlement out-of-court during the conciliation proceedings. Further research is needed to assess what kind of people these arbitrators were, whether or not they were former suit solicitors and if so whether they had become non-credentialed legal practitioners.

3-2 Qualified and Non-credentialed Legal Practitioners

In the case outlined below legal advocates sued the newspaper Nichinichi shinbun for libel for implying in a leading article that the legal advocates were litigation instigators. This case is highly instructive when considering the differences between the qualified and non-credentialed legal practitioners of the 1880s, and how disputes were resolved via conciliation and arbitration.⁷¹ Tōru Hoshi and Isshō Takahashi (1853-1886), who were representatives of the Tokyo Legal Advocates association, submitted a petition for conciliation to the Tokyo Tsukiji Ward

⁷¹ Masahiro Okudaira, *Nihon bengoshi shi* (Tokyo: Gan'nandō shoten, 1914), pp.342-417.

Court against the Nippōsha president Gen'ichiro Fukuchi; they alleged that his editorial on 14 March 1881 in *Nichinichi shinbun* libelled legal advocates.⁷² The editorial was a criticism of legal advocates from beginning to end, but some of the opinions expressed, such as the idea that legal advocates should not receive a starting deposit and only be rewarded if they won a case, could arguably be seen as constructive. The reason for the legal advocates' anger was that the editorial accused most advocates of abetting disputes in order to encourage people to sue and thus increase their profits....It alleged that the Japanese people did not think view legal advocates as being necessary for their communities, and saw them as serpents and scorpions. The article even suggested that legal advocates should be arrested in order to eliminate them from society and stop such groundless lawsuits.⁷³

Following the publication of the article the Tokyo legal advocates association held a meeting and selected a committee of ten people to represent all 99 legal advocates; from these ten, Tōru Hoshi and Isshō Takahashi were selected to represent the association in conciliation sessions at Tsukiji Ward Court on 18 May 1881. The conciliation failed however and a case was then filed in Tokyo District Court asking for a libel apology from the

⁷² Masahiro Okudaira, *Nihon bengoshi shi* (Tokyo: Gan'nandō shoten, 1914), pp.347-352;

⁷³ *Nichinichi shinbun* No. 2775, 14 March 1881; Masahiro Okudaira, *Nihon bengoshi shi* (Tokyo: Gan'nandō shoten, 1914), pp.342-347.

defendant, Gen'ichiro Fukuchi.

Fukuchi asked Tetsushiro Takanashi to be his legal advocate; however, Takanashi was one of the ten members of the committee formed by the Legal Advocates Association to pursue their libel claims. Takanashi accepted Fukuchi's request and duly left the committee due to this conflict of interest. The remaining members of the committee submitted their petition to the court on 1 June 1881. Hoshi and the other members of the Tokyo Legal Advocates Association claimed that Takanashi's switching of sides was a serious problem, and rejected his role as the defendant's proxy because they claimed he was still a member of the plaintiffs committee. They insisted that Takanashi could not act on behalf of Fukuchi unless the plaintiffs, meaning the members of the committee and in particular the two named legal advocates (Hoshi and Takahashi), gave their permission for Takanashi to be released from the list of plaintiffs.

In their internal debates on this matter, some members of the Tokyo Legal Advocates Association argued that Fukuchi's recruitment of Takanashi as his representative was actually very good evidence that legal advocates were useful in such cases, and thus weakened the argument made by Fukuchi in his editorial article. Nevertheless, the majority were angry with Takanashi for changing sides, as he had been one of the ten members chosen especially from the 109 members of the association to represent them. The Tokyo District Court agreed with this argument and

judged that Takanashi could not act as the defendant's lawyer because of this conflict of interest; even if his resignation from the ten-member committee was accepted by all parties, he still had had privileged access to documents and records that the plaintiffs were planning to use. Takanashi then appealed to the Tokyo Appellate Court.

At this stage a famous journalist Ryuboku Narusihma began to arbitrate and asked Nakamichi Shimamoto, a former Hokushusha president, to join him as an out-of-court arbitrator. They wrote a commentary on the editorial, which Fukuchi then agreed to publish. The gist of this commentary was that many of the numerous people who practiced nationwide as 'lawyers' were barely or not at all qualified, and almost all were shyster lawyers or pettifoggers. By contrast, only one or two in every hundred lawyers were honest qualified legal practitioners.⁷⁴ In order to give authority to the arbitration the Director-General of Honganji Temple then also joined as an arbitrator (in realty the director was in Hokkaido, and the vice-director took this role).

This case was an important one at the time, but is also important for this research. This is for three reasons, namely that it sheds light on the litigation system in general, shows how arbitration can work and demonstrates how the Legal Advocates' Association functioned. Firstly, regarding the litigation system

⁷⁴ Masahiro Okudaira, *Nihon bengoshi shi* (Tokyo: Gan'nandō shoten, 1914), pp.408-409.

in general, it shows that even after conciliation started or the case had reached the trial stage, out-of-court arbitration was often carried out effectively. Secondly, regarding arbitration, the case shows how arbitrators were able to resolve the dispute through skilful use of language, in this case by retrospectively qualifying the editorial's critical comments regarding lawyers such that they were now seen to be referring only to non-credentialed practitioners and no longer to legal advocates. There must be a social reality that the non-credentialed legal practitioners have been an active part of the legal profession, described in this chapter. Finally, the case demonstrates that the Legal Advocates' Association acted as a unified body in order to protect the honour of their members, thus showing the degree of professionalisation that the legal advocates had already achieved.

We will now turn to examine the non-credentialed legal practitioners who were being increasingly pushed during this period by new laws and the activism of the qualified legal advocates into a narrower range of legal practices, all of which were less desirable, less respectable and lower-paid. These non-credentialed practitioners seemed to conduct their work mainly in the conciliation courts. An article from 1880 discusses Sakamoto Minosuke (age 31), a conciliation proxy born in Izumo who came to Osaka four years earlier and was living alone in Hyakkennagaya Nanba village, Osaka Prefecture. He worked as a proxy by day but

according to the article needed another evening job in order to support himself, and in order to save money never visited entertainment districts.⁷⁵ Another article discussed a conciliation and court proxy who worked as a school teacher by day.⁷⁶

The proxies known as '*sōtō no dainin*' or 'proper proxies', were in reality neither relatives nor employees, but non-credentialed legal practitioners with some legal knowledge representing a party in court. We should make clear what a 'proper proxy' was. While the conciliation system was being established the role of proxy was restricted to relatives or employees, but the Ministry of Justice gradually permitted parties to utilise qualified or non-credentialed legal practitioners (called also proxy *dai'nin*) as representatives for those unable to attend court proceedings.

An article in the Yomiuri Shinbun shows that non-credentialed legal practitioners could be appointed to several conciliation cases simultaneously, at least until 4 July 1880.⁷⁷ The article details how the Honjo Ward Office in Tokyo asked the Tokyo Prefectural Office whether the Ministry of Justice's Rules for Civil Trial Proxies, which stated that a proxy had to be authenticated by a ward or village head before appearing in court and could only represent only one court case at a time, also

⁷⁵ *Yomiuri shinbun*, 2 February 1880, p.3.

⁷⁶ *Yomiuri shinbun*, 11 May 1879, p.2.

⁷⁷ *Yomiuri shinbun*, 4 July 1880, p.2.

covered conciliation or whether a proxy could represent two, three or more cases in conciliation at the same time. The Prefectural Office replied that proxies could represent more than one case at a time, and that it was not necessary for proxies to be authenticated by a ward head.⁷⁸

These examples seem to illustrate that the occupation of *dainin* was an established one. It certainly seems that local governments unconditionally permitted proxies in conciliation, as from 1875 to 1880 there seems to have been no restrictions on their participation.

In 1880 however the Ministry of Justice moved to stop non-credentialed legal practitioners' proxies having unlimited engagement in the court proceedings, and restrictions came into line with those used for conciliations. On 13 May of that year the Ministry of Justice declared that when there were no legal advocates available or there was an unavoidable reason for not using one, parties could utilise a relative or a 'proper proxy' with the permission of a ward or village head, although such a person could only be appointed to one case. However in an ordinance issued on 2 August (Tei No.17) the ministry retracted their previous insistence that in order for parties to authorise non-credentialed legal advocates to act as their proxies there must be no legal advocates available and that there must be an unavoidable reason for not using one. Tei No.17 revised the Rules

⁷⁸ *Yomiuri shinbun*, 4 July 1880, p.2.

of the Local Ward Court (No.66, 1876) by adding a provisory clause to Article 8, which stated that "a proper proxy should be appointed strictly one case at one time". As Article 8 provided for conciliation, the added words provided a definitive ruling limiting the use of non-credentialed proxies in court. Following this change further investigations were made to assess whether qualified lawyers who acted as conciliation proxies should be restricted to one case at one time.

The instructions of the Ministry of Justice shifted three times during 1883. Firstly, they instructed the Fukushima District Court on 8 February 1883 that as the status of a lawyer engaged in conciliation was not that of a qualified lawyer but that of a proxy, even a qualified legal practitioner could not be appointed to "more than one case from each client".⁷⁹ The point being made was that neither lawyers nor non-credentialed legal practitioner could work on more than one case at a time in conciliation, but the instruction also implied that it was acknowledged that lawyers could actually work in conciliation. The second instruction, delivered to the Mito District Court on 4 April 1883, stated that even legal advocates could only be permitted to be a proxy of conciliation in "one case in the same time".⁸⁰ The third and final

⁷⁹ *Minji reikunshū* (held by Kobe University Social Science Library), pp.52-57. The *Minji reikunshū* contains notifications and orders by the Ministry of Justice, other ministries and the Great Court of Cassation from 1876 until the very beginning of 1885, mainly in 1883 and 1884. It was originally owned by Kobe district court, and transferred to the Kobe University Library in July 1987. Information on the compiler and the date of publication has been missing. I would like to show my gratitude to the late Professor Akihisa Fujiwara as I could utilise this material by the courtesy of him.

⁸⁰ *Minji reikunshū*, pp.53-54.

instruction, delivered informally to the Morioka District Court on 10th October 1883, also stated that even a qualified lawyer could only be a proxy in conciliation "just once at the same time".⁸¹

Furthermore, the answer given by the Ministry of Justice to the questions of the Morioka District Court stated that more than half of the proxies involved in conciliation in Morioka District Court were qualified lawyers, and the second was that the court had permitted *dai'nin* proxies (non-credentialed legal practitioners) to be appointed to up to three cases at the same time, if they were all of different types: one in the Morioka District Court's civil court, one in the Morioka Local Ward's civil court, and the last one as a conciliation proxy. However, on 20 October 1883 the Ministry of Justice stipulated that a proxy could only have two cases at a time, not three; these two would be for civil court and conciliation.⁸² Two issues were clarified through this inquiry and answer, namely that it was now clear that the Ministry of Justice did not think qualified lawyers should be involved in conciliation cases, and that the ministry still saw *dai'nin* proxies (non-credentialed legal practitioners) as being a necessary evil, as they were permitting these *dai'nin* proxies to appear in court for their clients.

These communications between the Ministry of Justice and

⁸¹ *Minji reikunshū*, pp.56-57.

⁸² *Minji reikunshū*, pp.56-57.

various district courts led to a proclamation of the Grand Council of State on 24 January 1884 (No.1), which stated that non-credentialed legal practitioners could not be appointed to two or more cases at the same time in the civil courts and conciliation. Thus from 1884, the Ministry of Justice seems to have begun restricting the activities of non-credentialed legal practitioners.

To sum up, the Ministry of Justice declared this policy left parties involved in conciliation cases, which was a civil procedure, without legal representation. However, as they certainly required legal representation, non-credentialed legal practitioners stepped in to fill this role from 1883. Viewed from the perspective of the professionalisation of the legal profession, the restriction of conciliation activities for qualified lawyers established a distinction between the respective activities of qualified lawyers and non-credentialed legal practitioners, with the former becoming more identified with civil court procedures and the latter with conciliation.

3-3 Distinctions amongst Lawyers

There were no particular differences between those officers (judges) responsible for lawsuits and those responsible for conciliations, at least until 1884. Conciliation in Japan was presided over by 'judges' who were neither qualified nor well-grounded in law. They conducted trials as well as conciliations

but differed little from administrative officers until 1884, when an examination for judges and prosecutors was introduced.⁸³

It is clear that men who were held high in public esteem locally were acting in official court roles from the very beginning of the Meiji era, even though they had never conducted trials at judicial courts. To resolve the shortage of judges the Ministry of Justice had hired such people as lower court officers (*shusshi*). They were utilised as judges or assistant judges for conciliations from 1881 and for lawsuits from 1883.⁸⁴ These judicial officers assumed the reins of the judiciary, meaning that even conciliation in the courts had to be presided over by a judicial officer.⁸⁵

Judges and assistant judges seemed to employ different methods in resolving disputes in conciliation than they did in trials. In 1881, an article from the *Yomiuri* newspaper gave the following account:⁸⁶

"At Tsukiji Local ward court, Narikichi Otsuka and the other two co-plaintiffs of the Association of Yokohama lawyers sued chief editor, Nakabayashi, and the newspaper company (*Nichinichi shinbun*) for libel and demanded a formal apology and compensation; the third conciliation was held behind

⁸³ Iwao Kabuyama, *Shihōkan shiho seido enkaku* (Tokyo: Jigakusya, 2007), p.124, pp.138-141.

⁸⁴ No.10 *Shihōshō tei tasshi*, 6 March 1883(Meiji 16-nen).

⁸⁵ In this connection, it is worth noting that the petty jury system for criminal trials was not introduced until 1923. While it was executed from 1928 for 14 and a half years, the Jury Act 1923 (Law No. 50) was suspended in 1943 because of the escalation of the war. Juries for civil trials have never been introduced into Japan.

⁸⁶ *Yomiuri Sinbun*, 24 July 1881, p.1.

closed doors yesterday."

According to Yomiuri correspondent the plaintiffs said that Judge Tamefuku Nakasato, presiding over the case, had told both parties that today he dressed himself as an arbitrator to set himself apart from his role as a conciliation court judge in order to reach a settlement. The judge told the plaintiffs he could understand that they were very annoyed about the editorial in the Nichinichi shinbun, but also made the following direct appeal to them:

Yet, you lawyers also think that reckless and vexatious actions should be avoided for the benefit of everyone and for communities across the country. Therefore, if the newspaper published a retraction of the editorial which contained prejudicial views regarding qualified lawyers, could it be possible to reconcile in court?

According to the article the lawyers (i.e. the plaintiffs) did not consent to the judge's proposal, and replied as follows:

As the editorial article was an assault on lawyers from every point of view, the plaintiffs required that the paper publish a complete retraction of the editorial article. On the other hand, they agreed to comply with court arbitration conforming to the French Code of Civil Procedure, including the method of retraction of the article, if the defendant followed the

court's arbitration and promised not to breach it.

This article shows us that for judges the word 'arbitrator' had a different meaning from mere 'conciliator', in two respects: firstly, the text "today he dressed himself as an arbitrator to set himself apart from his role as a conciliation court judge" meant that he changed his clothes and seated himself at the same table as both parties in order to resolve the problem. The word 'arbitrator' referred to an ordinary person trying to settle a dispute, acting as mediator between the two parties, and was a position or role stipulated by French law.

Boissonade held that a judge should undertake conciliation wearing an ordinary person's clothes, talk like a father admonishing his son and host the conciliation proceedings at his office at court or in his chambers.⁸⁷ Japanese conciliation, however, did not operate as Boissonade had recommended. The Tokyo Court reported to the Ministry of Justice in September 1875 that their conciliation meetings were not coercive at all but held in a friendly manner, and that the parties rarely reached agreements at all, chattering away as though at a coffee shop or a pub. The Tokyo District Court (renamed in 1875 from 'Tokyo Court') asked whether or not a party should be kept in custody at court if they did not obey the judge's orders. The ministry said they should be

⁸⁷ *Soshōhō kaigi hikki*, Vols. 1-5; Makiko Hayashi, "Funsō kaiketsu seido keisei katei niokeru kankai zenchi no yakuwari", *Handai hōgaku* Vol.46, No.6 (1997), pp.172-176.

kept at court to make them (the parties) deliberate more carefully, and also noted that conciliation should be held with dignity, as if in a court.⁸⁸

It seems clear that the conciliation procedure was not based on written rules of law and order, but rather made use of customs and convention to settle problems through the parties' mutual understanding. This principle did not change from the introduction of conciliation, implemented under the Conciliation Abridgement Act of 1884,⁸⁹ until its abolition in 1890. The Act gave a clear-cut definition of conciliators and their required qualifications, stipulating that conciliators were persons placed in charge of conciliation in local ward courts, that they must be 30 years old or more and that they were to be chosen by two assistant judges, with the proviso that chief local ward court judges could also hold conciliation. Article 4 stipulated that if there were a lack of conciliators, other judges, assistant judges and lower officers (*shusshi*) could be appointed. In 1884 however it was clarified that conciliators could be assistant judges but not judges, although there were still exceptions to the rule.

⁸⁸ Ukagai from Tokyo saibansho, 22 September 1875: According to the inquiry of Tokyo court, since parties were too cozy to talk each other at conciliation as though they were at coffee shops or bars, the court asked the Ministry of Justice whether or not they could detain the parties at court until the parties become to think of their situation seriously. The reply from the ministry was that the court could detain the parties if they could do in a manner which would avoid dissatisfaction and criticism of them.

⁸⁹ Ordinance Tei No. 23 (Kankai ryakusoku), Ministry of Justice (24 June 1884). Ishii(trans. Chambliss), *Japanese Legislation in the Meiji Era* (Pan Pacific Press, 1958), p.492 refers the law as 'General Regulations for Mediation'; Wilhelm Röhl, 'Law of Civil Procedure' in W. Röhl (ed.), *History of Law in Japan since 1868* (Leiden and Boston: Brill, 2005), p.667, translates the law as 'Outlines of Mediation'.

The rules for enforcement of the Abridgement Act stated in Article 5 that the lower officers (*shusshi*) eligible for this should satisfy a number of criteria:⁹⁰

Article 5 When the Ministry of Justice orders the selection of a person or a vacancy for an assistant judge occurs, one of the persons in charge of conciliation should be selected in conformity with the following four conditions, by mutual agreement with a prefectural governor:

1. over thirty years old
2. of sincerity and of means, living within the jurisdiction of the local ward court or the district court, being respected and exerting a moral influence on local people and knowing the long-established customs and habits of the district
3. without intentional criminal record
4. no experience of bankruptcy

It is clear that the Ministry of Justice was in need of honest men who were well-off and knew the ways of their respective localities. The ministry, however, did not think that hiring lay people as lower-ranking officers was a viable solution. Although they were trying to appoint more assistant judges for conciliation, increasing the number of conciliation staff was permitted only in

⁹⁰ "Kankai ryakusoku sekō kokoroe" (Meiji 17-nen 6-gatsu 26-nichi [1884], *Shihōkyō yori shishin saibanshochō he naitatsu*, in *Hōki bunrui taizen* Vol. 11(Kanshoku-mon Kansei Shihōshō 1), p.435.

local ward courts annexed to district courts, for budgetary reasons.⁹¹ The appointment of local men as lower officers was therefore the second-best option for the ministry. It is noteworthy that the government chose to employ such local men not in honorary posts without pay but as fully-paid lower officers, despite the budget shortage.

Furthermore, the 1886 Regulation for Court Organizations (Imperial Order No. 40) positioned those persons in charge of conciliation fully within the bureaucracy, as officers with *han'nin* rank (junior official). The officer named *kankai-ri*, arranged one person at a local ward court. Thus, the person in charge of conciliation was distinguished from assistant judges. By 1890 ninety such officers (*kankai-ri*) were active throughout Japan: nineteen officers were distributed throughout the local ward courts within the Tokyo Court of Appeal's jurisdiction, thirty-eight within the Osaka Court of Appeal's jurisdiction, twelve in Nagasaki, three in Nagoya, fifteen in Miyagi and three in Hiroshima.⁹² It can be assumed that assistant judges were still being utilised as conciliators in 1890, as the number of *kankai-ri* officers was quite low compared to the number of local ward courts.

It was a fundamental rule that all people encharged with administering justice, even those in charge of conciliation,

⁹¹ "Shihosho dai ichikyoku dai sankyoku dai kyūkyoku gian Meiji 17-nen 6-gatsu 18-nichi", in *Hōki bunrui taizen* Vol. 11 (Kanshokumon Kansei Shihōshō 1), p.436.

⁹² *Yomiuri shinbun*, 25 February 1890, p.2.

should be officers. Conciliation held by judges or assistant judges should if possible be conducted under an authoritarian atmosphere within a courtroom; sometimes judges might force parties to resolve the problem under the guidance of the judge. With respect to the professionalization of judges within the Japanese legal system, it was also important that the assistant judges resigned from conciliation duties and concentrated on trials, as their work specialised in the basis of the law.

Section 4: Significance of Adjudication

Labour disputes should be treated as an important topic of research within the broader study of the formation of modern legal systems. One major difference between the Edo and Meiji legal systems was that in the Edo era people could not sue their masters or make labour relations' claims, because of the influence of Confucianism and the class system. In the early Meiji era, however, employees sought to take advantage of court procedures, including adjudication and conciliation, in order to enforce their rights. Claims for unpaid wages represented a substantial proportion of these cases, and over 17,650 applications were filed for conciliation nationwide in 1882. Employees brought their suits to the courts to demand employers paid them the wages and salaries they felt they were owed. The ability for all individuals to access court procedures is very important in understanding the positive role of conciliation in late 19th-century Japan. Most employees had inadequate resources or lacked the legal knowledge necessary to bring suits against their employers, and so they could not use the adjudication procedure on their own. Conciliation, however, was an oral yet official proceeding that carried no burden of plaintiff court costs until 1884.⁹³ It was simply a system whereby one party submitted an application to the court, conciliation proceedings commenced and the other party was

⁹³ Makiko Hayashi, "Kankai seido shōmetsu no keii to sono ronri", *Handai hōgaku* Vol.46, No.1 (1996), pp.164-165.

then summoned to appear.⁹⁴ The boom in employee-led conciliation cases ended however around 1884, and from then on both the conciliation and adjudication procedures were utilised less and less frequently for resolving labour disputes.

This section analyses details of labour disputes appearing in judgements between 1875 and 1890, as drawn from the Database of Civil Court Rulings Files held by the International Research Center for Japanese Studies.⁹⁵ When we use 'Employee' as a search term in this database, 196 cases are found. These can be divided into five types of lawsuit (plus an 'Other' category) based on the judgement delivered, as seen in Table 3-5 (below). For each of these judgement types the table shows the number of cases by employee-defendant relationship.

⁹⁴ As discussed in *supra* note (58), while the use of the conciliatory method for conflict resolution has been often recognised as the cultural reflection of the Japanese preference for a "harmonious" way of settling disputes, that recognition is not accurate. As for the introduction of the scheme, the purpose of the introduction of the conciliation procedure since 1875 was rather political or practical than cultural in the sense that conciliation was necessary for coping with the flood of the debt cases, as much as over one million cases per year as of 1883, which flowed into the legal system after the Restoration. See Makiko Hayashi, "Kankai seido shōmetsu no keii to sono ronri", *Handai hōgaku* Vol.46, No.1 (1996), pp. pp.141-180.

⁹⁵ All the lower courts judgements mentioned below are drawn from this database. <http://db.nichibun.ac.jp/ja/category/minji.html>. This database offers image files of all the original documents of civil judicial judgments given between 1870 and 1890 with some keywords.

[Table 3-5] Types of 'Employee' Lawsuits (1875-1890)

Table 3-5] Types of 'Employee' Lawsuits (1875-1890)														
	Defendants' attributes													
Types of 'Employee' Lawsuits	Principal (Male Employee)	Principal (Female Employee)	Father of Male Employee	Father of Female Employee	Mother of Employee	Husband of Employee	Wife of Employee	Brother or Sister of Employee	Relatives of Employee	Employment Agent/Guarantor/Certifier	Matchmaker	New Owner of Employee	Unknown	Total
Recapture of Employee	18	2	6	6		1	2	4	6	3		1	6	55
Compensation for Abscondment with Money			1							6	1		3	11
Repayment of Advanced Salary	23	4	9	10	1			5	2	13	4		30	101
Repayment for Apprentices Expenses			2	1									1	4
The Others										3	1		4	8
Unpaid Wages														17
Total	41	6	18	17	1	1	2	9	8	25	6	1	44	196

The 'Recapture of Employee' category refers to cases that employers filed to demand employees return to work. 'Compensation for Abscondment with Money' cases were lawsuits in which employers sought to reclaim money and goods they alleged employees had stolen from the workplace. Claims for 'Repayment of Advanced Salary' and 'Repayment for Apprentices Expenses' were also submitted by employers. Employers often sought such expenses from parents when apprentices quit and returned home before the expiration of the apprenticeship. 'Claims for Unpaid Wages', by contrast, were actions filed by (ex) employees against employers; this was the only type of action submitted to courts by employees. The 'Others' category included insignificant or minor criminal cases and nonappearances, and were submitted by both employees and employes. In 9 of the 196 cases defendants asked legal advocates to act on their behalf, in 47 of them they asked non-

credentialed legal practitioners to be their proxies and in 16 cases they asked relatives to be their proxies.

One of the core features of the 'Employee' lawsuits was that the defendants and employees are often different people. Table 3 shows that in 'Recapture of Employee' cases defendants were often parents (usually fathers). In 'Claims for Repayment of Advanced Salary' cases employment agents or guarantors also became defendants, as well as parents and other relatives, but. It is worth noting that in these individual labour disputes the representatives of plaintiffs and defendants were not always professionals; family members, usually male but not always, often represented the employee.

In 'Compensation for Abscondment with Money' cases the defendants were neither the employees themselves nor their parents/relatives, but rather employment agents, lodged servants or guarantors. According to Harafuji, it was the custom from the Edo period for these agents or guarantors to assume responsibility for the damages or injuries that employees incurred on their employers.⁹⁶

It is obvious that the relationship between employers and employees reflected the class system and traditional conventions left over from the social structure of the Edo era. They were very different from the modern labour lease contracts that were to be

⁹⁶ Hiroshi Harafuji, "Meiji zenki no koyō hō", *Kanazawa daigaku hōbungakubu ronshū: Hōkei-hen* No.8 (1960), p.69.

stipulated by the Japanese Civil Code of 1890. Despite this fact, most claims for 'Recapture of Employee' in the period 1875-1890 were dismissed on merit, with the substantial ground for such rulings being the protection of personal liberty. Similarly, litigation falling within the 'Claims for Repayment of Advanced Salary' category, also submitted by employers, was for the most part also accepted in favour of the plaintiff. Let us consider the grounds for these two types of judgement in detail.⁹⁷

The judgement for an 1881 Tokyo District Court case notes that the plaintiff had hired a man named Kumajirō, the third son of the defendant, under articles of apprenticeship for a term of seven years.⁹⁸ Kumajirō was apparently unruly and was managed strictly and worked hard so he fled from his apprenticeship and returned to his family home, with the result that the employer sued his parents and demanded Kumajirō's return. However, the court accepted Kumajirō's testimony and ruled as follows: "The very reason why Kumajirō left the plaintiff's workplace can be found in the fact that he received harsh treatment from the plaintiff...Because their natures are now irreconcilable, the plaintiff's claim is dismissed". The plaintiff was ordered to pay costs.⁹⁹

⁹⁷ Fumie Uno, "Meiji zenki 'deshi nenki bōkō' no koyō keiyaku wo meguru kakyūshin hanketsu no bunseki", *Kyūshū daigaku hōsei kenkyū* Vol.81, No.3 (2014), pp.397-425.; Makiko Hayashi, "Kobetsu rōdō funsō to saibansho: meiji zenki no 'yatoi nin'", *Chūkyō hōgaku* Vol.49, No.3=4(2015), pp.199-221.

⁹⁸ Rulings at Tokyo District Court 1881 No. 02319, 'Litigation for Recapturing Fixed-term Employee': Nichibun Database No.10100035-0173, 7 November 1881.

⁹⁹ It should be noted that some decisions did not take into account the defendant's defence of 'receiving harsh treatment'. For example, see Nichibun Database No.10100035-0440, 28 November 1881 (In this case, defendant claimed

A similar labour dispute lawsuit took place at Maebashi District Court in 1890.¹⁰⁰ Maebashi, 70 miles from Tokyo, was a city famous for its silk industry in the Meiji era. In this case the defendants were the employee himself and his father. The judgment declared that "the plaintiff could not make the defendant work unless he resorted to physical force. Claims from such plaintiffs shall not be accepted because the behaviour of the plaintiffs violated personal liberty. The protection of personal liberty is a fundamental principle not to be undermined". Similar justifications can be found in a number of other contemporary court decisions.

It is also worth noting courts' efforts to enforce the law regarding employment agreements. The longest term that could be applied to an ordinary employee's contract was, from a legal point of view, one year. A judgment given at the Tokyo District Court in 1878¹⁰¹ details how a plaintiff had employed a girl named Tsune, the eldest daughter of the defendant, at his spinning factory in March 1876 in exchange for payment of an advanced salary of 10.50 yen (time period not specified in the judgement). However, the plaintiff had asked the defendant for restitution because Tsune had fled the factory in June 1878. The defendant testified that his daughter had been coerced into working excessively hard and

that the employee was beaten relentlessly, and lost his hearing. The judge, however, found his testimony as insufficient).

¹⁰⁰ Rulings at Maebashi District Court 1890 Civil No. 00171, 'Litigation for Recapturing Employee': Nichibun Database No.10700022-0121, 15 October 1890.

¹⁰¹ The Rulings at the Tokyo District Court 1878 No. 01017, 'Litigation for Recapturing Employee': Nichibun Database No.10100014-0004, 31 August 1878.

that the term of the contract should have been shorter than one year. The court accepted this argument and dismissed the plaintiff's case. The judge ruled that the agreement was void, even though the written contract declared the term of employment to be over one year, with no upper limit. In effect, the court gave priority to legal policy over the written agreement between the parties.¹⁰²

To summarise, cases such as these show how labour relationships in the early Meiji era were a continuation of earlier employment structures and hierarchies, for example in their use of family guarantors and of agents of surety that would compensate for damages caused by employees. However, despite this pre-modern tradition, courts dismissed many claims for recapture of employees based on the protection of personal liberty. Moreover, courts tended to apply an upper limit to contractual terms. This strengthened the employment rights of young workers in apprenticeships or similar arrangements, many of which were virtually tantamount to human trafficking or slavery.

Labour disputes went to court throughout Japan during the early Meiji era, but this does not necessarily imply that these cases were adjudicated. Claims for unpaid wages and salaries, for example, were mostly dealt with through the conciliation or dunning procedures. Individual employees bravely brought their

¹⁰² The ground for the judgment was Great Council of State (Dajōkan) Decree No.295 in 1872.

cases to court, without any collective movements or union support. These were not the atomistic or isolated labouring employees characteristic of capitalism; rather, they were still largely bound by the traditional social restrictions and worldview of the preceding Edo era, such as family, class and other feudalistic codes of conduct.

Even in this modernising age, the courts dismissed almost all cases brought to court by employers seeking restitution from workers. The basis for these decisions was clearly the legal policy declared by the Meiji government in 1872: it was seen as pivotal that a modern society, or one that sought to be seen as such, uphold the rights of personal liberty and physical freedom. Finally, we should note the substantial differences that existed between the conciliation and adjudication procedures during the early Meiji era and that only the latter procedure ultimately proved capable of freeing employees from what was effectively slave labour.

Chapter 4 Adaptation: Education and Examination System

Section 1: Introduction

Section 2: From Voluntary Associations to Law Schools

Section 3: Differentiation between Lawyers

Section 4: The Attorney Act

Section 1: Introduction

This chapter describes the establishment process of the Japanese legal profession's education and qualification systems.

The study of Western laws and legal systems in the late Edo and early Meiji eras led to greater awareness in Japan of new and innovative legal concepts. Although some knowledge of western international law had been acquired during the Tokugawa regime through the study of Chinese classics and Dutch works, other forms of law, such as constitutional law, civil codes, commercial codes and western legal systems, were not well known until the late Edo era and later.¹ One important source of knowledge during the late Edo era had been *Elements of International Law* (1836), a book written by Henry Wheaton and translated into Chinese in the 1840s by William A. P. Martin. Another source that became available at the very end of the Edo era in 1865 was a translation

¹ See Masao Maruyama and Shūichi Katō, *Hon'yaku to Nihon no kindai* (Tokyo: Iwanami shoten, 1998) p.119ff. See also Shūichi Katō and Masao Maruyama (eds.) (1991), *Hon'yaku no shisō* [Nihon kindai shisō taikēi, Vol.15] (Tokyo: Iwanami shoten, 1991).

into Japanese by Amane Nishi of the notes of Simon Vissering, a lecturer at Leiden University.² The concept of civil law was a radical one for the Tokugawa regime. Even in Europe it could be controversial; it is said that in the 1840s a Dutch scholar who had read the Dutch civil code wrapped it in a cloth and buried it under a barn, saying it would cause people to go insane.³ The civil code is generally based on civil rights, which confirm the right to own private property, exclusive and strong indemnification for land property, and equal treatment amongst contractors.⁴ Western laws and legal systems offered a revolutionary vision of a very different society to that of Japan's pre-modern feudalism; little wonder that many private study groups on western law were formed by ambitious young people in the early Meiji era, from 1872 to 1880.

We should be cognizant that the leading agents of legal education in the early Meiji era were highly diverse. One important agent was the Meiji government itself, which sought to

² Frans B. Verwaijen, *Early Reception of Western Legal Thought in Japan: 1841-1868* (unpublished, 1996); Frans B. Verwaijen, "Tokugawa Translations of Dutch Legal Texts", *Monumenta Nipponica*, Vol.53, No.3 (1998), pp. 335-358. Ryōsuke Yamaguchi, "'Mille-feuilles influences': Reception of foreign law in the Edo-Meiji period Japan", *Kyushu University Legal Research Bulletin* (On-line edition), 2013-Vol.3 (2013), pp.1-11.

³ Yoshio Mizuta, *Seiōhō Kotohajime* (Tokyo: Seibundō, 1967) p.88.

⁴ Even in the Meiji era government officers were arguing about how to translate the word 'right' into Japanese. It is well-known that Shinpei Etō mediated between Rinshō Mitsukuri, the translator who suggested that the term *kenri* (権利) should mean 'right', and certain officers of the Meiji government, who fulminated against the usage of the kanji *ken* and questioned whether or not Mitsukuri was implying commoners could exercise this power; Frans B. Verwaijen, *Early Reception of Western Legal Thought in Japan: 1841-1868* (unpublished, 1996); Frans B. Verwaijen, "Tokugawa Translations of Dutch Legal Texts", *Monumenta Nipponica*, Vol.53, No.3 (1998), pp. 335-358; Ryōsuke Yamaguchi, "'Mille-feuilles influences': Reception of foreign law in the Edo-Meiji period Japan", *Kyushu University Legal Research Bulletin* (On-line edition), 2013-Vol.3 (2013), pp.1-11.

train judges as well as compile codes, and another was those who were engaged in voluntary political movements and private study groups. The legal education and qualification systems introduced by the government established a hierarchy of legal advocates and judges inside the legal professions, as Freidson has noted.⁵ Indeed, it was this introduction of a hierarchy structuring the legal education bodies and legal qualifications that had enabled the Meiji government to gradually gain control over legal education. Although Chapter 6 will discuss the legal professionalisation, a process which became increasingly centred on profit-seeking and was characterised by this hierarchy of professions and para-professions and by the monopoly of their expertise from the 1910s onwards, Chapter 4 first shows how the Meiji government used education and qualifications to establish a professional hierarchy of law from the very beginning of the construction of the legal profession in Japan.

Section 2 of this chapter focuses on the legal education led by private study group activists, and deals with the education system proposed by the government. Section 3 explores the differences in the examination and apprentice systems employed for judges and prosecutors on the one hand and legal advocates

⁵ Eliot Freidson, *Profession of Medicine: A Study of Sociology of Applied Knowledge* (Chicago and London: The University of Chicago Press, 1988 [1970]). According to Freidson, "Training also follows a pattern whose order roughly parallels the prestige, independence, and imputed responsibility of the work. Training ranges from professional schools associated with universities requiring a full higher education before several years of training, at one extreme, to short informal on-the-job training at the other." (*ibid.*, p.54). See also Eliot Freidson, *Professional Powers: A Study of Institutionalization of Formal Knowledge* (Chicago and London: The University of Chicago Press, 1986).

(*daigen'nin*, later *bengoshi*) on the other. Finally, Section 4 sheds light on the process and intention behind the enactment of the Attorney Act (*bengoshi hō*).

Section 2: From Voluntary Associations to Law Schools

2-1 From Private Schools to Private Study Groups

The private study groups of the early Meiji era, formed by highly motivated and ambitious young men, inherited the role played by some private schools in the Edo era. In the late Edo era there were three types of school: official fief schools for the samurai class, known as *hankō* (students typically entered at ages 7-10 and graduated at 14-20; all male); schools for basic reading, writing and arithmetic, known as *terakoya* (approx. 6 to 12; mixed); and private schools, known as *shijuku* (after *terakoya*, approx. 10-20 but also some young adults; almost exclusively male).⁶ As Richard Rubinger noted, the independence of the private schools distinguished them from the other two types; they were autonomous institutions of teaching and learning, free from political control.⁷ The relation between a teacher and students was generally personal and individual: students came to the school because of the knowledge and education the teacher possessed and was able to transmit, and because of the personality and character of the teacher. Private schools were not corporative but personal and non-perpetual concerns; if the teacher left the school or died the school would usually close, even though it may have had several

⁶ Matsutarō Ishikawa, "*Hankō*", "*Terakoya*" and "*Shijuku*", in *Kokushi daijiten* (Tokyo: Yoshikawa kōbunkan, 1979-1997), Vol. 11, pp.742-765/ Vol.9, pp.918-921/ Vol.6, p.772-773. From 1854 to 1867 there were 4,293 *terakoya* schools nationwide, and it is believed there were thousands of *shijuku* from the 1820s to the end of the Edo era.

⁷ Richard Rubinger, *Private Academies of Tokugawa Japan* (Princeton, NJ.: Princeton University Press, 1982), pp. 8-10.

thousand students. According to Ikuo Amano, Edo-era Japanese private schools were considerably different from European schools or European universities; the latter were a kind of community of scholars providing education to their students. By contrast, Japanese schools were comprised of one teacher only; if the teacher left, the school usually closed.⁸

In addition Rubinger also discussed the merit system which existed in the private schools, for instance in Tekijuku, an Osaka school run by the teacher Kōan Ogata (1810-1864). Although the official fief schools could not have academic competitions because of the risk that lower-class samurai students would score better than their upper-class peers, the private schools were permitted to run tests and competitions for all students.⁹ In the fief schools the differences in status meant that reading Chinese literature aloud or debate between students, for example, were avoided due to the fact that the differences in ability of the students would be clearly brought to light.¹⁰ On the other hand, the private schools were not organised along feudal status lines. Rather, they emphasised the length of time spent learning and the student's marks. Furthermore the range of subjects taught at private schools, which were for example Dutch studies, medical

⁸ Ikuo Amano, *Kyōiku to Senbatsu no Syakaishi* (Reprinted ed., Tokyo: Chikuma shobō, 2006 [1982]), p.117ff. R.P. Dore, *Education in Tokugawa Japan* (Reprinted ed., London: Athlone Press, 1984[1965]).

⁹ Rubinger, *Private Academies of Tokugawa Japan*, p.139. Richādo Rubinjā (trans. Minoru Ishizuki/ Tōru Umihara), *Shijuku: Kindai nihon wo kizuita praibēto akademi* (Tokyo: Saimaru shuppan, 1982).

¹⁰ R.P.Dore, *Education in Tokugawa Japan* (The Athlone Press, 1965), p.180ff; R.P. Dōa (trans. Hiromichi Matsui), *Edo jidai no Kyōiku* (Tokyo: Iwanami shoten, 1970), p.165ff.

science, physics and metallurgy, and the fact that these subjects were rigorously examined and the test results ranked, led to talented students seeking to enter such schools.¹¹ Dore noted that the 1771 translation of a Dutch anatomy book is usually seen as the beginning of western education, which was collectively referred to as 'Dutch learning'. Although medicine was the major topic there were translations in many other fields; areas such as metallurgy and navigation became increasingly important as foreign invasion came to be seen as an increasing threat.¹²

It was notable however that jurisprudence or legal studies was not included within the range of subjects taught at such schools, as it was not seen as a developed academic discipline during the Edo period. As there were no national standardised tests for such topics, such as imperial examinations, schools that encouraged their students to debate these issues were bound to develop these fields further than those schools that didn't allow such discussions. Although the fief schools didn't permit competitive debate of potentially controversial topics, Chinese studies private schools did. They pursued research in this area and created new forms of Japanese education through their open discussion of political and other subjects. At the end of the Edo era some private schools were teaching western jurisprudence that had been translated into Chinese.¹³ In addition a few private

¹¹ Dōa, *Edojidai no Kyōiku*, p.142ff.

¹² Dore, *Education in Tokugawa Japan*, p.160ff.

¹³ Bakumatsu Ishinki Kangakujuku Kenkyūkai and Hironobu Ikuma (eds.), *Bakumatsu*

schools teaching English, such as those led by Guido Verbeek [Verbeek] (1830-1898) and Noriyuki Ga (1840-1923), seem to have taught jurisprudence as one of their English-language topics.¹⁴

The scrivener-advocate firms (*daisho-daigen jimusho*) of the early Meiji era and the law study groups annexed to them seemed to have had similar characteristics to the private schools of the preceding Edo era in terms of their teaching new western studies and in their ranking of students by tests and competitions, and also in their students' feelings of admiration for the schools' founders.¹⁵ Kangi-en (in Hida in Bungo, now Ōita prefecture) and Tekijuku (in Osaka, run by Kōan Ogata) had well-known competition systems.¹⁶ According to Naramoto most private schools did not have a strong connection to the status system and its hierarchy, but rather introduced systems which were more or less performance- or achievement-based. This was a notable change, as in the pre-modern society of the Edo era it was very unusual for youths from commoner backgrounds or even from low-ranking samurai classes to be examined in their academic abilities.

ishinki kangakujuku no kenkyū (Hiroshima: Keisuisha, 2003).

¹⁴ Mutsurō Sugii, "Furubekki", in *Kokushi daijiten* (Tokyo: Yoshikawa kōbunkan, 1991), Vol.12, pp.366-367.

¹⁵ The phrase 'scrivener-advocate firm' is the author's translation for *daisho daigen jimusho*, which was a firm of scribes/solicitors (i.e. scriveners) and legal advocates or barristers.

¹⁶ Tatsuya Naramoto (ed.), *Nihon no Shijuku* (Tokyo: Kadokawa shoten, 1974), pp.94-113, pp.204-221. Kangi-en school deserves special mention, as it remained in operation for ninety-two years (1805-1897) and established a school system that went beyond the personal reputation of its teachers. Kangi-en had about 100 enrolments every year; in addition to study, its students were required to follow the school's strict policies on discipline and to cook, clean and carry out other chores. See also Takeo Yamamoto, "Kangi-en", *Kokushi daijiten* (Tokyo: Yoshikawakōbunkan, 1983), Vol.3, p.785.

2-2 Voluntary Associations annexed to Firms

Some of the private study groups of the early Meiji era, many of which had either been founded by or were annexed to scrivener-advocate firms,¹⁷ became strongholds of the Movement for Liberty and Human Rights (also known as the Freedom and People's Rights Movement) in 1880s. For these ambitious young people learning western law and western legal systems was aimed not only at revising the unequal treaties but also at gaining liberty and equal treatment under the law for Japanese people.¹⁸

Risshisha of Tosa (now Kōchi prefecture) and Hokushūsha of Osaka played an important role in the Movement for Liberty and Human Rights. Risshisha was initially a political group; one of its famous statesmen, Taisuke Itagaki,¹⁹ established an in-house scrivener-advocate firm. In April 1874 this firm launched a study group called the Institute of Law,²⁰ and the directorship was assigned to Tosa-born Nakamichi Shimamoto²¹. After the Meiji

¹⁷ In 1872 the Judicial Staff Regulations and Operating Rules (Article 43, Dajōkan Mugō of August 1872) were enacted to create the various legal professions, such as judges, prosecutors, advocates and scriveners. This law enabled legal practices to gain national certification and law firms to be created.

¹⁸ Darryl E. Flaherty, *Public Law, Private Practice: Politics, Profit, and the Legal Profession in Nineteenth-Century Japan* (Cambridge, MA. and London: Harvard University Asia Center, 2013), pp.132-155.

¹⁹ Taisuke Itagaki (1837-1919) was born in Tosa (*han*), now Kōchi prefecture, into a middle-class samurai family. He created the Liberty Party (Jiyūtō) and became President of the Party in 1881; he was Home Minister of Japan in 1896 and 1898.

²⁰ Okudaira, *Nihon Bengoshi shi* (Tokyo: Gan'nandō shoten, 1914), pp.82-83; Osaka Bengoshikai, *Osaka Bengoshikai 100-nen shi* (Osaka: Osaka Bengoshikai, 1989) p.18ff.

²¹ Nakamichi Shimamoto (1822-1893) was from a lower-class samurai family in Tosa. After the Meiji Restoration he established a close relationship with Shinpei Etō and was much valued in the Ministry of Justice. He worked as an senior prosecutor (sixth rank; shōrokui) and then as a 3th grade attendant (*santō shusshi*) for the Ministry of Justice from April 1873. He resigned in November 1873 and organised the Movement for Liberty and Human Rights. He also established a number of schools to prepare students for further legal education and practice at the bar: Risshisha in Kochi prefecture and Hokushūsha in Osaka, Tokyo and other areas. See also Shihōshō (ed.), *Shihō enkakushi* (Tokyo: Hōsōkai, 1939), pp.21-23; Akira

Restoration he had become a senior officer in the Ministry of Justice, but had later resigned following the political upheaval that occurred in November 1873 regarding the subjugation of Korea (seikanron seihen). Shimamoto stated in the institute's founding declaration that the role of law is "to guarantee the rights of ordinary citizens."²² The purpose of the institute was to teach law in order to "enhance the rights of ordinary citizens and enrich the catalogues of civil rights"; these rights were to apply to all, even citizens who committed crimes or declared bankruptcy and did not themselves know the law.²³

On 15 June 1874 Shimamoto established a combined scrivener-advocate firm and study group in Osaka called Hokushūsha, receiving a permit from the Osaka Prefectural Government on 22 July. He then went to Tokyo in October and Hiroshima in December, organising the Tokyo Hokushūsha and Hiroshima Hokushūsha branches respectively. Following this he opened the Sakai, Kyoto and Ōtsu branches in early 1875, all in order to spread the knowledge of western law and legal systems.²⁴

The same intents and purpose as those of Tosa Risshisha and Hokushūsha were shared by the many scrivener-advocate firms and study groups springing up across Japan. Flaherty listed them: in Tokyo, Naoshi Motoda(1835-1916) established Hōritsugakusha and

Shimamoto, *Ishin monogatari: Keiho kashira Shimamoto Nakamichi* (Bungei shobō, 2003); Flaherty, *Public Law, Private Practice*, pp.141-145.

²² Okudaira, *Nihon bengoshi shi*, p.82; Osaka bengoshikai, *Osaka bengoshikai 100-nen shi*, p.18.

²³ *Ibid.*, pp.18-19.

²⁴ *Ibid.*, pp.100-128.

began operating a scrivener-advocate firm in May 1875;²⁵ in 1876, Dōryū Kitabatake (1820-1907) and Kentarō Ōi (1843-1922) established Kōhōgakusha, and later Meihōgakusha, while Morikazu Numa (1844-1890) established Kyūkōsha in 1879; these were all scrivener-advocate firms which included study groups.²⁶ In early 1880 Tokyohōgakusha was established with a counsel division and a school division. Other scrivener-advocate firms included Bengishōsha of Osaka, Hokensha, Kichihōsha, Hoansha and Jungisha, the histories of which have been documented in earlier research.²⁷

However, an important difference between the private schools of the Edo era and the law study groups of the early Meiji era was the establishment of a qualification and education system for the latter, introduced with the aim of identifying quality candidates to fill the growing numbers of professional, state-level positions. Increasingly, studying a subject came to be associated with obtaining a professional qualification and job.

On 22 February 1876 the Regulations for Legal Advocates (daigen'nin kisoku), the first law regulating the professional certification of advocates, was passed. This provided for the

²⁵ Flaherty, *Public Law, Private Practice*, pp.149-154; Okudaira, *Nihon bengoshi shi*, p.151ff; Hōsei daigaku Hyakunenshi Hensan Inkai (ed.), *Hōsei daigaku no 100-nen: 1880-1980* (Tokyo: Hōsei daigaku, 1980), p.12.

²⁶ Meiji daigaku Hyakunenshi Hensan Inkai (ed.), *Meiji daigaku 100-nen shi*, Vol.3 (Tsūshi-hen 1) (Tokyo: Meiji Daigaku, 1992).

²⁷ Flaherty, *Public Law, Private Practice*, p.154; Seiichi Hashimoto, "Meiji shonen no daigen'nin to hōgaku kyōiku", *Shizuoka daigaku hōsei kenkyū* Vol.13 Nos.3=4, 2009, pp.59-134. At Hōritsugakusha's opening ceremony the French legal advisor to the Ministry of Justice, Gustave Emile Boissonade de Fontarabie (1825-1910), made a speech; he also taught a French law class at Meihōgakusha. See Okudaira, *Nihon Bengoshi shi*, p.164ff.

development of an examination to assess law school applicants.²⁸ The requirements of the assessment were that applicants (1) understood the outline of the general rules of the state; (2) understood the outline of the criminal and penal code; and (3) understood civil and criminal procedures; furthermore, the assessment sought to (4) assess the conduct and integrity of the applicants, and the quality of their CV (i.e. their educational, employment and personal history).²⁹ Nevertheless, the 1876 law was not a rigorous, well-designed examination, and was essentially a basic questionnaire.

From reviewing *Nihon bengoshi shi* of Okudaira, it is clear that some legal practitioners who were already working did not apply for certification under the new Regulations.³⁰ As such, applicants for certification tended mainly to be students of the study groups mentioned earlier, such as Hokushūsha, Hōritugakusha, Bengishōusha and Hokensha.³¹ The first examination was held by Tokyo Prefecture's general affairs office on 10 April 1876, but clearly exposed the lack of legal ability and knowledge of the prefectural officers charged with administering it. As soon as the thirty applicants began the examination they immediately complained about the contents of the test. The questions were all

²⁸ Article 1 of Kō No.1 Shihōshō futatsu (notification), 22 February 1876 (Meiji 9).

²⁹ Article 2 of Kō No.1 Shihōshō futatsu (notification), 22 February 1876 (Meiji 9).

³⁰ Okudaira, *Nihon bengoshi shi*, p.202ff.

³¹ Okudaira, *Nihon bengoshi shi*, p.181ff; Flaherty, *Public Law, Private Practice*, pp.140-155.

concerned with such superficial issues as the titles of various laws and the dates they came into effect, as well as their outlines. Some of the questions were so worthless that applicants became angry; the Tokyo examination was cancelled and rescheduled for later in the year.³² The chasm between the levels of knowledge of the applicants and administrators was easily explained: the examinees had been studying law and jurisprudence in their private study groups for several years, whilst the examiners had never studied law at all. The expansion in legal knowledge of the scrivener-advocate firms and study groups that had occurred between 1872 and 1876 was made crystal clear to all parties.

From 1876 to 1880 qualified legal advocates increased the number of legal associations in their local communities and continued to teach and study law. The publication of the translated Napoleonic Code as well as of many legal textbooks in the latter half of the 1870s led to steadily-increasing understanding of western legal issues and concepts.³³ Their legal knowledge was enriched through discussions and study group classes with foreign legal advisers.³⁴ Over time, the main function of the

³² Okudaira, *Nihon bengoshi shi*, p.181ff.

³³ Seiichi Hashimoto, "Meiji shonen no daigen'nin to hōgaku kyōiku", *Shizuoka daigaku Hōsei kenkyū* Vol.13 Nos.3=4 (2009), pp.126-134.

³⁴ In addition to Boissonade, Robert Lipman, who was a legal advisor to the Ministry of Justice and in particular an advisor to the Osaka Appellate Court, often delivered lectures at the court as well as in private schools, and also published two collections of lectures on French criminal and civil codes. Roberuto Rippuman [Robert Lipman], *Furansu keihō kōgi* (Osaka: Okajima shinshichi, 1879); Roberuto Rippuman (trans. Chūjirō Shibukawa), *Futsukoku minpō keiyaku kōgi* (Osaka: Okajima shinshichi, 1879).

study groups evolved into acting as preparatory schools for the inspection and certification of lawyers.

2-3 Restriction of the Advocates' Associations

The autonomous lawyers' associations, including their study groups, were prohibited by the revised Regulation for Legal Advocates (Kaisei daigen'nin kisoku; enacted 13 May 1880); the same law also revised the examination itself. The second article in the 1880 revision stipulated that the Ministry of Justice both conduct a western style legal examination (instead of an inspection by local government) and assume responsibility for issuing qualifications. The fourteenth article stipulated that lawyers should belong to their local bars, of which there was one in each court's jurisdiction. Furthermore, the twenty-second article prohibited any autonomous associations except the official bar provided for in Article 14.

On 24 May 1880 Hokushūsha and its branches began to close, and by the end of 1881 Hōritsugakusha, Bengishōusha, Hokensha, Kichihōsha, Meihōsha and all the other associations and study groups mentioned above had dissolved their associations and study groups. For the Meiji government the dissolution of these autonomous associations ensured a severance of relations between the law firms (former scrivener-advocate firms), most of which were championing people's rights, and the law students who were preparing for the lawyer's examination in the various study groups

annexed to these same law firms. Coming at a time when most of these firms' activities were aimed at protecting human rights and obtaining further political rights, this move severely limited their influence over the students.³⁵

Another reason for the disbanding of the associations was that with rising standards and ever-more students taking the examination, it was becoming too difficult to design and administer it. This could not be handled by lawyers working voluntarily in their spare time; rather, a systematised curriculum and professional teachers were required. Moreover, the criminal and penal code and the criminal procedure code were enacted in July 1880, which were the first western codes drafted by Boissonade. With this development, private technical schools for learning law and legal systems were established: Tokyo Hōgakusha (which became Hosei University) in April 1880 and Senshūgakkō (which became Senshū University) in September 1880 and Meiji Hōritsugakkō (which became Meiji University) in December 1880. These private technical schools for law, all in Kanda, Tokyo, attracted students from all over Japan.

As the 1880s progressed the government seemed to have succeeded in their introduction of a legal advocates' bar examination and their disbandment of the troublesome autonomous

³⁵ Nobuyoshi Toshitani, "Nihon shihon shugi to erito: Meiji-ki no hōgaku kyōiku to kanryō yōsei (1) (2)", *Shisō* No.493, pp.886-898/ No.496, pp.1376-1391;. Nobuyoshi Toshitani, "Japan's Modern Legal System: Its Formation and Structure", *Annals of the Institute of Social Science* Vol. 17 (1976), pp.1-50.

organisations, which had sometimes served as bases for political movements. However, as a result of the difficulty of the bar examination the supply of new lawyers began to lag behind demand. Litigants didn't seem to differentiate between qualified and non-qualified practitioners, simply seeking out the best practitioner they could afford, but even courts, which clearly did prefer practitioners to be qualified, were obliged to retain non-qualified legal practitioners due to the lack of lawyers. We will discuss this dual lawyer system in Section 3, but first we will examine the education system created and run by the government for judges/prosecutors and legal advocates.

Section 3: Differentiation between Lawyers

3-1 Legal Education in the Ministry of Justice

In this section I shall endeavour to shed some light on the role of the Meiji government in the development of legal education and legal professionalisation in the 1870s and 1880s. Immediately after the Ministry of Justice (Shihōshō) was set up in 1871 the ministry requested the establishment of an institution called Meihō-ryō, which was a law school annexed to the ministry.³⁶ A document entitled "Meihō-ryō no gi ni tsuki ukagaigaki" (Law School Foundation Inquiry) explained the grounds for this request:

In the Western countries, the study of law has become a specialised field within the higher education system. Even the most talented person cannot manage judicial tasks unless they know how to proceed in litigation and in passing appropriate sentencing. Undersupply of legally educated persons will cause great inconvenience because recent government regulations require the distribution of judges and prosecutors to each court nationwide. To properly educate persons who possess the talents necessary to practice law, certain tasks must immediately be undertaken by the Ministry of Justice. We therefore ask for permission to set up Meihō-ryō, where students interested in studying

³⁶ Meihō means "to interpret and clarify the meaning of the laws"; Ryō literally means "dormitory", and indeed the students did live at the school, but in this context the meaning is closer to "administrative agent".

law will be selected and educated. Our basic policy should be to dispatch those who have completed study at Meihō-ryō to each court based on the selection process. If this is not done, the Ministry of Justice would not be accomplishing its original purpose. We therefore ask the Government to permit the establishment of Meihō-ryō.

August 1871, Shihōtaifu (a Ministry of Justice post).³⁷

According to this document Meihō-ryō was intended to train people in court procedures and in appropriate sentencing. Once they completed their education they were qualified as judges and prosecutors, and were then sent to various courts around the country (principally the Supreme Court and appellate courts).

In September 1871 Meihō-ryō was established within the Ministry of Justice, based on Proclamation No. 491 (the Grand Council of State, 27 September 1871). The operation of the institution was set out in the Judicial Staff Regulations and Operating Rules (Shihō shokumuteisei) of 3 August 1872 (Unnumbered Proclamation, the Grand Council of State).³⁸ Article 3 delineated the separate roles of three institutions responsible for conducting Ministry of Justice work: the courts, prosecutors' offices and Meihō-ryō. Articles 79-83 stipulate the tasks of

³⁷ Author's translation of *Hōki Bunrui Taizen*, Vol.54: Keihō-mon 1(1988) (Tokyo: Hara shobō), p.77; Yutaka Tezuka, *Meiji hōgaku kyouiku shi no kenkyū* [Tezuka Yutaka Chosakushū, Vol.9] (Tokyo: Keiō tsūshin), p.8.

³⁸ This notification was abolished on 8th May 1875 when the Shihōshō, Kenji and Daishin'in Judicial Courts Regulations and Operating Rules (No. 10 Shihōshō tasshi notification) were published.

Meihō-ryō as follows: drafting bills, studying foreign laws, adjusting rules issued by different Ministries, editing *fukoku* notifications (acts), setting up student regulations for Meihō-ryō, translating/arranging proposals submitted by foreign teachers and sentencing in criminal cases that were not defined in the penal codes.³⁹ This establishment of a legal training system within the Ministry of Justice was a crucial step towards the adoption of Western laws and legal systems in Japan.

Applicants sitting for entrance examinations were tested not only on their knowledge of Chinese classics, which was a basic requirement for would-be bureaucrats at the time, but also on their knowledge of French. This was because French law was taught at Meihō-ryō by French lecturers in their native tongue, starting with Henri de Riberolles (1837-1908) in 1872. He was followed by two legal advisers named as law professors by the government, Georges Hilaire Bousquet (1846-1937)⁴⁰ and Gustave Emile Boissonade de Fontarabie (1825-1910); Boissonade began lecturing on 9 April 1874.⁴¹

The first students entered Meihō-ryō on 5 July 1872. They enjoyed privileges such as free tuition, free living costs and even an allowance from Meihō-ryō, but in spite of this many students dropped out. By the time Boissonade began teaching the

³⁹ Three Chinese-style penal codes were enacted from 1868 to 1873; see Chapter 3, Section 1. The principle of legality was not established in Japan until 1880.

⁴⁰ Georges H. Bousquet, *Le Japon de nos jours et les échelles de l'Extrême Orient: ouvrage contenant trois cartes, 2 Vols.* (Paris: Hachetee, 1877).

⁴¹ *Shihōshō nisshi* (The Ministry of Justice Digest).

original twenty had reduced to eleven, and so four new students were allowed to enter as substitutes as of 4 April 1874.⁴² It was decided in August 1875 that seven of these fifteen would be dispatched to France for further French law study.⁴³ To fulfil the resulting vacancies, twelve new students were admitted in September 1875.⁴⁴

The twenty students remaining in Japan, who were all treated as belonging to the same class, graduated from the Law School (now known as Shihōshō Hōgakkō following a name change in May 1875) in August 1876. Three of them (Kōzō Miyagi, Hisashi Ogura and Tatsuo Kishimoto) were then sent to France for further study while eleven others, including Tetsusaburō Kinoshita, were appointed to the Ministry of Justice.⁴⁵

Shihōshō Hōgakkō adopted a unique policy: the education of the second cohort of entrants did not begin until after the graduation of the first cohort. Consequently, the application procedure for the second set commenced as late as July 1876, just before the graduation of the twenty students of the first class.

⁴⁶ 104 newcomers were selected as the second class of Shihōshō Hōgakkō. Beginning in September the lectures for this class were

⁴² Tezuka, *Meiji hogakukyouikushi no kenkyu*, 1988.

⁴³ These seven students were Kōji Kinoshita, Toshizō Kumano, Shōichi Inoue, Shirō Isobe, Shōgo Kuritsuka, Yutaka Sekiguchi and Seiichi Okamura.

⁴⁴ These students were Sanshirō Ōshima, Michinao Fukuhara, Yūzaburō Ichinose (Sawai), Tomosaburō Hashimoto, Shōjirō Ida, Sadayoshi Kameyama, Raizō Tachiki, Toyozō Takagi, Toraichi Sugihara, Tadayoshi Fujibayashi, Shinpei Iwano and Seikichi Ōtsuka.

⁴⁵ The remaining six students (Sugimura, Fujibayashi, Tachiki, Fukuhara, Yashiro and Ōtsuka) did not remain in the employ of the Ministry of Justice, as they were deemed to be weaker students.

⁴⁶ Tezuka, *Meiji hōgaku kyōiku shi no kenkyū* (Tokyo: Keiō tsūshin), pp.44-55.

delivered by Georges Appert (1850-1934), who had been hired as a full-time teacher; Boissonade probably made no direct contribution to the instruction of this class.⁴⁷ A four-year preparatory French course followed by a four-year course in French law were offered. Again, many students dropped out during the eight-year program: only 37 of the 104 completed the course in July 1884.

In the same month the Ministry of Justice asked Dajōkan (The Grand Council of State) to award a bachelor's degree in law to the Shihōshō Hōgakko graduates; based on these students' results, 33 of the 37 graduates in the second cohort were awarded degrees.⁴⁸ The grounds for this request, which was sent as a circular memo for approval (*ringi-sho*) to all government departments involved, was that having completed an eight-year program in French and French law these graduates could have easily passed university law examinations.⁴⁹ There was a precedent for this, as The Grand Council of State (Dajōkan) had awarded bachelor degrees to graduates from both the Agricultural School (managed by the Ministry of Agriculture and Trade) and the Engineering University (managed by the Ministry of Engineering). The Second Board of The Grand Council of State accepted this request and ordered the Ministry of Education to make the necessary

⁴⁷ Bousquet had returned to France in March 1876, and so Boissonade was the only French teacher until Appert's arrival.

⁴⁸ Iwao Kabuyama, *Shihōkan shiho seido enkaku* (Tokyo: Jigakusha, 2007), pp.151-152. Although 37 of the second cohort of graduates completed the course, only 33 were awarded the bachelor of law degree.

⁴⁹ *Shihosho nisshi* (The Ministry of Justice Digest); Tezuka, *Meiji hōgaku kyōikushi no kenkyū*, pp.80-87.

arrangements. A further request for the same treatment for the class of 1876 was also accepted, and as a result 25 graduates from the first cohort (of whom 5 were study abroad students) received *ex post facto* bachelor's degrees in law in November 1884.

By 1884 therefore only 62 students had graduated from the Law School (25 in 1876 and 37 in 1884). It should be noted, however, that a short, intensive program conducted by Japanese instructors was also offered by the institution from July 1879. This abbreviated course, known as the "speed course" (*sokusei ka*), was intended to train judges in just two years (later three years).⁵⁰ Initially graduates of the Law School, such as Yūzaburō Ichinose, gave live interpretation of French teachers' lectures. Graduates returning from France however soon began to deliver lectures themselves. A considerable number of students, 161 in total, finished the short program: 47 in 1879, 101 in 1883, 1 in 1884 and 12 in 1885. The Law School (Shihōshō Hōgakkō) was abolished in 1885 and its students and teachers were integrated into the Imperial University Law School.⁵¹

⁵⁰ Robert Miller Spaulding, *Imperial Japan's Higher Civil Service Examinations* (Princeton, NJ.: Princeton University Press, 1967), pp.38-39. *Shihosho nisshi* (The Ministry of Justice Digest). Note however that according to Spaulding (p.39) some of those who were aiming to become lawyers (legal advocates) were given examination exemptions; this is incorrect, as all those who wished to become a lawyer had to pass the exam. See Tezuka, *Meiji Hōgaku kyōikushi no kenkyū*, pp.131-145.

⁵¹ Unlike at the Law School, where the government subsidised their study and living expenses, at the Imperial University students had to pay all their fees and costs.

3-2 Legal Education at the University

One of the best measures of the level of professionalisation of a career path is how its qualification system is organised. The process of introducing the legal qualification system will be explored in this section.

In Japan, the qualification systems for legal advocates (*daigen'nin*) and judges were differentiated at a very early stage. While the qualification examination system for the former was established in 1876, the equivalent for the latter group was only introduced in 1884 when the Judge Appointment Rule was passed.⁵² Although there had been interviews and brief tests since 1875 for those seeking to become judges, these were ad hoc processes dependent upon vacancies opening up; there were no formal, regular appointment examinations.⁵³

In spite of one group being formally examined and the other not for this eight-year period, and despite the fact that judges outranked legal advocates (*daigen'nin*), Articles 1 and 2 of the Judge Appointment Rule made it clear that the two qualifications were connected. Firstly, Article 1 stipulated three means by which an individual could qualify as a judge: (1) obtain a bachelor's degree in law; (2) qualify as a legal advocate (*daigen'nin*); or (3) pass the judge's qualification examination. Secondly, Article 2 of the Judge Appointment Rule stipulated that an applicant

⁵² No.102 Dajōkan tasshi (notification), Hanji tōyō kisoku, 26 December 1884.

⁵³ Takashi Katō, "Meiji zenki, shihōkan nin'yōsei no ichi danmen: Meiji jūnen Hiroshima saibansho no baai", *Shūdō hōgaku* Vol.23 No.2 (2001), pp.219-245.

meeting one or more of the above three requirements must still complete a one-year apprenticeship at a district court before becoming a judge. However, if a candidate had conducted legal practice as an advocate for over five years or had a bachelor's degree in law and had also conducted legal practice as an advocate for over two years, the candidate could skip the apprenticeship. This implied that a one-year judge's apprenticeship (category 3) was equal to five years' legal advocacy (category 2) or two years' legal advocacy for law graduates (categories 2+1). In addition, according to Article 2 of the Judge Appointment Rule legal advocates with bachelor's law degrees were more highly ranked than those without degrees. Although individuals in all categories of qualification could apply to be judges following a one-year apprenticeship at a first instance court, those without apprenticeship experience who aspired to become judges were differentiated by their respective lines of qualification: legal advocates with law degrees needed at least two years of practice, whereas legal advocates without law degrees needed at least five years. This meant that practicing lawyers (*daigen'nin*) were required to have completed a longer period of legal practice than those who had passed the judge's qualification examination.

This suggests that law degree holders enjoyed higher status than those who qualified via the examination; university graduates had not been required to pass the legal advocate examination; in practice this meant the University of Tokyo (later known as

Imperial University), as it was the only university in Japan until 1897.⁵⁴ This was a key distinction that served to demarcate those legal advocates with law degrees from those without law degrees, and from private law school graduates, who were also required to pass the exam. In addition, legal advocates without law degrees were seldom appointed as judges, as Article 2 required them to have "exceptional knowledge and experience in law" and was very hard to meet. While the standard employed to measure a candidate's "knowledge and experience in law" was whether he was as competent as those who held law degrees, those who possessed such degrees at the time were exceptional people who had been through a highly competitive selection process. Then, from 1884, graduates of the Law School of the Ministry of Justice (Shihōshō Hōggakō) were treated equally to those of the regular bachelor's law degree course of the Law Department of the University of Tokyo. This established a hierarchy of law schools: private law school courses and the intensive courses of Law School of the Ministry of Justice were regarded as inferior to the regular courses of these two institutions (the Ministry of Justice Law School and the University of Tokyo Law School). Graduates from private law schools could pass the judge's exam, although it was more difficult for them given their generally lower educational levels.

⁵⁴ Ordinance Hei No.7, Ministry of Justice (19 May 1879), Hōritsugaku sotsugyō no mono daigen eigyō shutsugan toriatukai kata; Ordinance Hei No.16, Ministry of Justice (29 November 1880).

This law school hierarchy was reinforced in a number of subsequent developments during the 1880s. Firstly the management of the Law School of the Ministry of Justice was transferred to the Ministry of Education in 1884, and the school was renamed Tokyo hōgakkō [Tokyo Law School].⁵⁵ In 1885 this school was taken over by the French Law course in the Law Department of the University of Tokyo. An 1886 Imperial Order Teikoku daigaku rei declared that henceforth the University of Tokyo would be the sole Imperial University and at the same time the Ministry of Justice Law School was abolished.⁵⁶ In the same year the Rule on the Special Regulation of Private Law Schools, which purported to control the content and quality of the education offered at private law schools, was set up. The Rule on Higher Civil Service Examination Probationary and Apprenticeship followed in 1887. This rule stated that only graduates from a limited number of private schools were qualified to take the Higher Ranking Civil Service Examination. In 1888, the Rule on the Special Regulation of Private Law Schools was superseded by the Rule on Specially Approved Schools; this rule tightened the pre-requisites determining whether graduates of private law schools could take the judge's qualification examination. Even the graduates of certain private schools which fulfilled the requirements imposed by the Rule on Higher Civil

⁵⁵ No.4 Notification (Monbushō kokuji), countersigned by the Justice Minister of Education on 26 December 1884.

⁵⁶ No.3 Imperial Order (2 March 1886).

Service Probationary and Apprenticeship Examinations were not automatically permitted to take the exam.

During the 1890s a further significant scheme was introduced, the so-called "privilege of graduates of the Imperial University Law School" (Teikokudaigaku Hōkadaigaku). Article 65 Section 2 of the Court Construction Act of 1890 stipulated that graduates of the law schools of the Imperial University were permitted to be appointed as assistant judges/prosecutors without further qualification.⁵⁷ Furthermore, Article 4 Section 2 of the Attorney Act of 1893 declared that these graduates could become lawyers without taking the lawyer's qualification examination. Without doubt, this entitlement elevated the status of the Imperial University Law School, and this education system resulted in the overwhelming superiority of the Imperial University(ies) within Japan's legal education system.⁵⁸

In the Attorney Act (Bengoshi hō) of 1893, this privilege and hierarchy was made clearer than ever before. Although we will discuss this in Section 4, it should be noted that Article 4 of the Act listed those who could obtain the lawyer's qualification without examination: (1) holders of judge and prosecutor qualifications, and practicing lawyers; and (2) JD, Imperial University Law School graduates, former University of Tokyo

⁵⁷ In 1890 there was only one Imperial University in Japan, but the Court Construction Act of 1890 seemed to be anticipating that other Imperial Universities would be established in the near future. The second university within the imperial system was Kyoto University, founded in 1897.

⁵⁸ There was one Imperial University in Japan until 1897, when the second was established in Kyoto.

Faculty of Law graduates, regular graduates of the Ministry of Justice's former law school, Ministry of Justice apprentice judges and apprentice prosecutors.

In 1891, a new law entitled Judge and Prosecutor Appointment Rules was enacted to govern the administration of the examination for these roles. This was enforced until 1922, when it was superseded by the government and the Ministry of Justice (enacted in 1918, enforced from 1923). This exam was actually comprised of two parts, the first being on legal knowledge and the second a practical test (e.g. how to write judgements). To become a judge or prosecutor candidates had to pass the first examination, complete an 18-month court apprenticeship and then pass the second examination; the legal advocate's exam, by contrast, consisted of only the legal knowledge exam, and was easier than the judge's legal knowledge exam. Moreover, those with bachelor's law degrees were exempted from having to pass the first exam.

Not surprisingly these changes were received negatively by those connected to private law schools, and beginning in the 1900s they began to criticise these schemes through the Lawyers' Association (Nihon bengoshi kyōkai). These critics requested the abolishment of the "privilege of graduates of the imperial universities law schools" and consolidation of the qualification examination for judges and prosecutors with that for attorneys.⁵⁹

⁵⁹ See Yoshihiro Misaka, *Kindai nihon no shihōshō to saibankan: 19-seiki nichifutsu hikaku no shiten kara* (Osaka: Osaka Daigaku shuppankai, 2014), p.225ff.

This effort bore fruit in Laws No. 39 and 40, enacted in 1914: the qualification examinations mentioned were unified and renamed as the Higher Examination for Jurists (Kōtōshiken Shihōka).⁶⁰ These laws however required the completion of junior high school before taking the new Higher Examination. As enrolment in junior high schools under the pre-war education system was very limited, the private law schools did not require students to provide any educational records before taking their entrance examinations other than to show that they had completed their compulsory education (i.e. elementary school). These measures came into force in 1923 and resulted in ending the relationship between the qualification system for lawyers and the minimum requirement for candidates to have graduated from junior high school in order to take the lawyers' examination. Only those who had graduated from junior high school, which was only 5% of the population, and those judged as having equivalent ability, were allowed to take the examination. This sequence of changes established the importance of lawyers' individual educational records.⁶¹

An unexpected result of these measures was a rapid increase in the number of lawyers, as many graduates of the law schools of the two imperial universities (Tokyo and Kyoto) rapidly applied for bar membership as lawyers before their privilege was

⁶⁰ Misaka, *Kindainihon no shihōshō to saibankan*, pp.235-257.

⁶¹ Yoshihiro Misaka, *Kindai Nihon no shihōshō to saibankan: 19-seiki Nichifutsu hikaku no shiten kara* (Osaka: Osaka Daigaku Shuppankai, 2014), pp.225-281.

abolished.⁶² In addition, the numbers were further boosted when in both 1921 and 1922 examinations were held twice, as opposed to once annually, for those candidates who had not graduated from junior high school but had either graduated from or were still attending private law schools.

To sum up, this section has examined the formalisation of the Japanese legal profession's qualification system. Initially many law study groups, within which youths studied law together outside a formal school structure, were annexed to scrivener-advocate firms. In addition, many private Chinese literature schools also played active roles during the early Meiji era because Japan's laws and regulations were compiled in line with Ritsu Chinese codes. The next steps were the introduction by the government and the Ministry of Justice of examinations for the first step in the legal qualification system, and the banning of the private study groups because of their strong connections to the freedom and people's rights movements. Differentiation between the various legal professions was introduced in 1876, when the examination for legal advocates was established. The difficulty of the new examination necessitated the establishment of professional fulltime schools; these were the private technical law schools which opened from 1880. These new schools also filled the gap left by the closure of the regional law firms' private study groups, as after the enforcement of the revised legal

⁶² Misaka, *Kindai nihon no shihōshō to saibankan*, pp.257-264.

advocates' regulations and subsequent pressure from the Meiji government, regional law firms had ceased to provide legal education for small private study groups (although of course firms' internal legal training continued).

Finally, this section explained how the Law School of the Ministry of Justice as well as the Imperial University Law School were both established in Tokyo as education institutions to train code compilers, judges and prosecutors.

Section 4: The Attorney Act

4-1 Choice between Higher Status and Free Business

One of the important stages in the professionalisation of any field is the process of re-naming the occupation, as we have already discussed in Chapter 1. In Japan's case the re-naming of the legal profession was proclaimed in the Court Organization Law of 1890⁶³ and in the subsequent establishment of new laws governing lawyers' activities. The term *daigen'nin* or legal advocate finally became *bengoshi* in 1893 when the Attorney Act (*Bengoshi-hō*) was enforced.⁶⁴

Two different plans were debated in the imperial parliament in December 1890 following the government's tabling of the Attorney Act (*Bengoshi-hō*).⁶⁵ Due to strong opposition from legal advocates the government withdrew the bill on 9 January 1891 after the second reading stage, but following revision the bill was finally passed in 1893.⁶⁶ A careful examination of the first version of the bill may prove useful in clarifying the plans for the legal profession which the government and parliament had originally envisioned. One idea had been that legal advocates should enjoy a role and function in the judicial system much the same as that played by judges and prosecutors. Another idea, suggested by members of parliament during the discussion, was that

⁶³ Law No.6, 10 February 1890.

⁶⁴ Law No.7, 4 March 1893.

⁶⁵ *Kizokuin Giji Sokkiroku* No.8, 23 December 1890.

⁶⁶ Law No.7, 4 March 1893.

legal advocates should be deemed to be equivalent to medical doctors in the sense of being seen as 'free' professionals, i.e. autonomous businesses as opposed to being more like government officials. At the heart of the differences between the two ideas was a distinction in the concept of the legal profession.⁶⁷ The argument that attorneys should be members of a free profession was proposed by academics like Masaakira Tomii⁶⁸ and Nobushige Hozumi⁶⁹; both of these scholars had studied abroad, and both had helped to draft the Japanese Civil Code.

The first suggestion stressed that Japanese attorneys should have the same status in the judicial system as judges or prosecutors, and be just as expert in the understanding and application of law. The government and officers on the governmental committee of this bill, such as Rinshō Mitsukuri,⁷⁰

⁶⁷ *Ibid.*

⁶⁸ Masaakira Tomii (1858-1935) was born in Kyoto and entered Tokyo University of Foreign Studies. He was awarded a doctorate by Lyon University in France and became a professor of civil law at the University of Tokyo. He was selected to be a member of the drafting committee for the Japanese Civil Code in 1893. From 1904 to 1925 he was the president of Ritsumeikan University in Kyoto. Tomii argued that 'the nature of barristers is markedly different from that of judges and prosecutors... ordinary people or clientele are the best people to judge the ability of barristers...' (*Kizokuin Giji Sokkiroku*, No.24, p.335). For concise introduction of Tomii with bibliographical information, see Kazuhiro Takii, "Tomii Masaakira", in Masato Miyaji et al (eds.), *Meiji jidai shi daijiten* (Yoshikawa kōbunkan, 2012), Vol.2, p.881.

⁶⁹ Nobushige Hozumi (1855-1926) was born in Uwajima in Ehime and entered Daigaku nanko in 1870 and Kaisei gakko in 1874 (these two institutions later became part of the new University of Tokyo). In 1876 he went to Kings College, University of London and transferred in the same year to Middle Temple. Just after being called to the bar in 1879 he moved to Berlin University to study German law. In 1881 he became a lecturer at the University of Tokyo. Like Tomii (see *supra* note (87)) he was a member of the drafting committee for the Japanese Civil Code. For concise introduction of Hozumi with biographical information, see Ryūichi Nagao, "Hozumi Nobushige", in Masato Miyaji et al (eds.), *Meiji jidai shi daijiten* (Yoshikawa kōbunkan, 2013), Vol.3, p.426; for a detailed exploration of early stage of his career, also see Shigeyuki Hozumi, *Meiji ichi hōgakusha no shuppatsu: Hozumi Nobushige wo megutte* (Tokyo: Iwanami shoten, 1988. The late Professor Shigeyuki Hozumi was a grandson of Nobushige Hozumi).

⁷⁰ Rinshō Mitsukuri (1846-1897) translated the Napoleonic Codes into Japanese at the beginning of the Meiji era and compiled modern Japanese laws with Gustave

were pushing strongly for equality between attorneys, judges and prosecutors; they also sought to establish a level of governmental control over the conduct of attorneys' business practices sufficient to elevate them to the same level of judicial quality as judges and prosecutors. Under the 1890 Bill attorneys would have been obliged to register in one branch of the judicial courts and would not have been able to work in another branch or register in another jurisdiction. For example, an attorney registered in a district court in Tokyo could not work in a district court in Kyoto or in the Tokyo appeals court. The government's intention was to align the structure governing attorney registration with the system used to assign judges and prosecutors. These latter two groups were assigned to a branch and could not stand at different courts. The quality of judges and prosecutors in appeal courts was considered to be markedly higher than that of those working in district courts, and those in the Supreme Court (*Daishin'in*) higher still (to become a judge in appeals courts they needed at least five years' experience in district courts).⁷¹ The government therefore also planned to take responsibility for attorneys' education in order to ensure their legal skills remained at the same level as those of judges. It was thus planned that judges be recruited from the ranks of attorneys. However,

Émile Boissonade de Fontarabie (1825-1910), creating many equivalents for French legal terms. For concise introduction of Mitsukuri with bibliographical information, see Isamu Mitsuzono, "Mitsukuri Rinshō", in Masato Miyaji et al (eds.), *Meiji jidai shi daijiten* (Yoshikawa kōbunkan, 2013), Vol.3, pp.542-543.

⁷¹ *Kizokuin Giji Sokkiroku*, No.8, 23 December 1890.

following vociferous opposition from legal advocates and other MPs, both the idea of one-branch registration and of governmental control of attorneys' education were removed from the bill.

The second idea, suggested by members of parliament, stood in opposition to the government's bill. This developed the concept that attorneys should be free professionals, released from government control both in their everyday work and in the post-certification education required of them. Hiroyuki Katō⁷² and other members of the House of Representatives argued for litigants being able to choose their attorneys in the same way that patients can choose their medical doctors. This would make it unnecessary to design a system in which the government bears the responsibility for the quality of attorneys, as they would have had to do if attorneys were fully part of the judicial system. This proposal would enable an attorney to be a proxy for clients immediately after passing the lawyer's examination, even in the Supreme Court. Practice or training for attorneys in a court apprentice system, and the accompanying examinations, were deleted from the bill. However, despite these various compromises, it became clear to the government that their plan to elevate attorneys' status to that of judges and more crucially perhaps to

⁷² Hiroyuki Katō (1836-1916) was an academic specialising in national law and policy derived from German law and was also a famous philosopher. He opposed the Movement for Civic Rights and Freedom in the 1880s, later becoming the president of the Imperial University of Tokyo and a member of the House of Representatives. For concise introduction of Katō with bibliographical information, see Kōji Eizawa, "Katō Hiroyuki", in Masato Miyaji et al (eds.), *Meiji jidai shi daijiten* (Yoshikawa kōbunkan, 2011), Vol.1, pp.541-542.

enable much tighter governmental control over attorneys' activities still did not have the parliamentary support necessary to turn the bill into law.⁷³

In addition, articles in the draft of the 1890 Attorney Act Bill provided that attorneys had to pay a considerable amount of money to the Ministry of Justice as a registration fee and security for their activities; unsurprisingly this created much opposition amongst the legal advocates (*daigen'nin*), who would have been controlled by this law. Analysis of these arguments during this period shows that the government was trying to acquire greater prestige for attorneys by keeping them under the control of the Ministry of Justice, but that lawyers themselves (as well as some members of parliament) chose instead to 'escape' from direct governmental management and to create the attorney as a modern 'profession'.

Legal advocates (*daigen'nin*) and their organisations were strongly canvassing and lobbying, both in Tokyo as well as regionally and locally, to defeat the government's plans for attorneys to be divided into three ranks (for the district courts, appeals courts and Supreme Court) and be obliged to pay a large registration fee and deposit. Lawyers saw the bill as an

⁷³ *Kizokuin Giji Sokkiroku*, No.8, 23 December 1890. According to the Court Organization Law of 1890 it was possible for an attorney to become a judge. However, in practice the recruitment of judges from the pool of attorneys was limited because of revisions made to the Attorney Act of 1893 by legal advocate groups opposed to the government's plans for apprenticeships and practical examinations.

infringement of their rights; their strong opposition, both in and outside parliament, resulted in its eventual withdrawal.

4-2 Apprenticeship System

Following the government's withdrawing of the bill in 1891 it was revised and re-submitted to the House of Representatives on 16 December 1892. On 3 March 1893, after many revisions, the Attorney Act (Bengoshi-hō) passed both the House of Representatives and the House of Lords and finally became law.⁷⁴ This section will examine the complex circumstances and debate around this amended bill.

Attorney status relative to judges and prosecutors was debated in both houses, although the plan for lawyers to enjoy the same status as judges and prosecutors within the judicial system was weakened. This revised bill took account of dissenting opinions, such as those voiced in 1890, in a number of ways. Firstly, once an attorney (*bengoshi*) was registered and attached to a district court, he could work at the local appeals court as well as in the Supreme Court; additionally, if jurisdiction over an attorney's case was transferred to a district court where he normally was barred from working, he would be able to continue working on the case (section 12 of the 1893 Bill) However, to become an attorney at the Supreme Court three years' experience was required (section 11 of the 1893 Bill). Furthermore, if a

⁷⁴ Law No.7, 4 March 1893.

shortage of attorneys arose in a rural area, a court could order a neighbouring district court attorney to act as a proxy for a defendant or plaintiff; a plaintiff could also ask the court to allow an attorney from another district to represent her/him in court (section 13 of the 1893 Bill).

The Attorney Act Bill of 1893 differed from its predecessor in that it considered the profession of attorney to be a 'free' profession; attorneys could stand at the bar at any court level (district courts or appeals courts) immediately after passing the examination and becoming qualified attorneys. In spite of the abandonment of the argument that attorneys should have equal status to judges and prosecutors, and have equivalent ability and education, the bill still required that the difficulty of the attorney's examination should be close to those for judges and prosecutors. Therefore, section 3 of the bill provided that attorney candidates had to take two exams, one for knowledge of law and another for the post-apprenticeship practice of law. This was the same number of examinations as taken by judge and prosecutor candidates.

However, those members of parliament who saw the 'attorney' as a free profession (many of whom were themselves attorneys) deleted the provision which would have required them to take an apprenticeship between two compulsory exams (section 3 of the 1893 Bill), and in its place submitted an amended bill requiring that attorneys should pass only one examination, which would be on the

knowledge of law. Those responsible for this revision argued there were three reasons for doing this. Firstly, there were insufficient locations and facilities and a lack of material resources and capability to create an attorney apprenticeship system. Secondly, attorneys were already carrying out their work as autonomous businesses which were members of a free profession within which potential customers were already freely selecting attorneys; they argued that every business should be chosen by its clientele, i.e. the market, and therefore it was not the responsibility of the government to supply well-educated and well-experienced attorneys to the public, even if they did so for judges and prosecutors. Finally, the shortage of attorneys in rural areas had reached a serious level, which would be more quickly addressed by the introduction of a one-examination system than by a lengthy apprenticeship system. It was this chronic shortage of rural-based attorneys that the government decided to focus its attention on once the bill had passed.

The newly-passed Attorney Act 1893 did not refer specifically to the examination, because it delegated authority for this to the Ministry of Justice. As such, neither an apprenticeship scheme nor double-examination system (as in place for judges and prosecutors) was enacted. Attorneys were not bound to the district court in which they had paid their registration fee (section 10 & section 12); moreover, this fee was reduced from 100-500 yen to 20 yen and the security deposit was cancelled. This

revision demonstrates that attorneys had already started to create a profession similar to that of the medical doctor in that it was relatively unbound by governmental 'interference', but it also shows that attorneys were not accorded equal social status with judges and prosecutors and that they were not able to enjoy the same internal sense of solidarity that members of these two groups did.

There are two main conclusions to be drawn here. Firstly, the government intended to create the profession of 'attorney' as part of an official legal structure within which they would be afforded equal status with judges and prosecutors. It also seems that the government had an eye to the future; in the 1890 and 1893 bills they clearly saw attorneys as a pool from which to draw prospective judges and prosecutors. Secondly, it was not the government but members of parliament, including lawyers and academics, who succeeded in blocking this drive for equality between attorneys and judges/prosecutors. They did this in order to realise their vision of the attorney as an independent business-based occupation. The result was a trade-off; attorneys were ranked lower than judges and prosecutors in terms of their social status, but their activities were less restricted than they would have been if the government's provisions had been in place.

Lacking the long tradition of civic responsibilities and public service that many status-linked professions in Europe had, the new occupation of 'Japanese attorney' had to make a collective,

and very difficult, decision as to how to shape their profession's path and position within Japanese society. On the one hand, social prestige and an apprentice system could have conferred upon them equal authority with other judicial officials; on the other, they could remain relatively free from governmental control and could function as businesses. With long-established guild traditions status professions in the West were both able to run their businesses effectively and in the nineteenth century to make the change from status to occupation professions. However, in the Japanese case, it was not possible to have both. Freeing the profession of the lawyer from overbearing government management was ultimately seen as preferable to a rise in status. This was one of the key traits in the process of legal professionalisation in Japan. Attorneys governed by the Attorney Act were defined as 'professionals' and as members of a business-based occupation.

In summary, there were many voluntary study groups and associations annexed to scrivener-advocate firms (*daisho-daigen jimusho*) nationwide. Although Japanese modernisation was driven by the Meiji regime they were not able to lead in all areas. Local people and institutions often took control of their won self-education; for example, there had been a tradition since the Edo era for private schools (*shijuku*) to pursue new and revolutionary studies. As with other areas the government could handle were: they established a professional law school in the Ministry of Justice, and faculty of Law at the University. The education and

examination systems were nationalised and private advocates entered into negotiations aimed at establishing their qualifications as being equivalent to those of judges and prosecutors. Non-credentialed legal practitioners also played an important role during the formative days of the profession, as there were far more of them than there were qualified advocates. The number of the non-credentialed practitioners were double even in the rulings. The supply of legal practitioners did not include sufficient qualified lawyers. Some qualified advocates began to focus on particular issues, such as protecting human rights or expanding suffrage. The self-conception of attorneys began to change through the 1890s from being reformers or creators of a new society to holding an elite position in society.⁷⁵ The Attorney Act defined attorneys as belonging to a free profession without tying them down as being one of the state's institutions of justice, the self-awareness barely supported the expansion of the scope of activities, and in their radical social activities in particular.⁷⁶

⁷⁵ According to Rabinowitz "Formal status inferiority came to an end in 1893, and though the bar might complain of a lack of consideration shown the practitioners by judicial officials, as happened in 1893, or undertake investigation of the "unfriendly" attitude of bailiffs and the "haughtiness" of officials, as was done in 1907, the situation on the whole seems to have improved. Lawyers began to fill important positions in government, an occasional official entered the bar, and social contact between lawyers and high-ranking officials occurred from time to time" (Richard Rabinowitz, "The Historical Development of the Japanese Bar", *Harvard Law Review* Vol.70, No.1 (1956), p.71).

⁷⁶ Haley pointed out that this tendency was still notable in the 1990s: "Legal scholars are not the only law reformers in Japan. The influence in Japan of lawyers who are active in progressive, that is, left-liberal-reform efforts, is remarkable." John Owen Haley, *The Spirit of Japanese Law* (Athens, GA:: The University of Georgia Press, 1998), p.51.

Chapter 5 Modernisation: Court Procedure and 'The Profession'

Section 1: Introduction

Section 2: Abolishment of Conciliation

Section 3: Non-enforcement of Attorney Utilisation

Section 4: Enforcement of Retirement

Section 1: Introduction

This chapter seeks to shed light on the modernisation and Westernisation of Japan's legal systems from the point of view of the government officers, code compilers and attorneys of the Meiji era who were seeking to bring about these changes. The purpose of this chapter is thus not to discuss the meaning of modernity or modernisation theory, nor is it to assess the degree of modernisation achieved during the Meiji era from a contemporary viewpoint or in comparison to some 'ideal' modern political and legal system. It does not seek to identify in a non-Western country's pre-modernity the foundations of its modernity. Rather, the purpose of this chapter is to clarify the intent of the government and lawyers who sought to create a new legal structure for Japan based upon imported Western laws, practices and notions of 'the professional'.

Following the introduction, Section 2 of the chapter focuses upon the discussions held between the Meiji government, the Ministry of Justice and the Investigation Committee for the Civil

Procedure Code of 1890 (hereafter, the Civil Procedure Code) on the relationship between court-based adjudication and the two forms of conciliation (one pre-trial and one during trial), and on the deletion of clauses relating to pre-trial conciliation from the drafts of the Civil Procedure Code. Section 3 then examines why there were so many pro-se litigants in Japan (i.e. litigants who do not retain lawyers and represent themselves in court), and why criminal defence counsel by attorneys was not made compulsory by the Criminal Procedure Code of 1890 (hereafter, the Criminal Procedure Code).¹ Finally, Section 4 analyses the Ministry of Justice's attempts in the late 1890s to encourage the retirement of many older judges. Many of these judges were seen as incompetent by their critics and were effectively forced to retire, despite judges' status being constitutionally guaranteed. Furthermore, this section will examine the respective sense of unity and integration felt by attorneys and judges and the opinions of the Ministry of Justice and of the Japan Lawyers' Association (Nihon bengoshi kyōkai) with respect to the encouraged, or enforced, retirement of judges.

¹ The code's principle was that an attorney should act as defence counsel, rather than a lay person or non-credentialed practitioner, but this was not mandatory.

Section 2: Abolishment of Conciliation

During the legal professionalisation period and up to at least 1884, when a qualification examination was introduced, almost all of those who conducted trials and conciliations differed little from administrative officers.² Both types of procedure were presided over by 'judges' who were neither qualified nor well-grounded in law. To address problems arising from the shortage of capable judges the Ministry of Justice promoted a conciliation system from 1875 to 1890; furthermore, the government's strategy after 1884 seems to have been to utilise laymen of high esteem as lower-ranking officers, not in order that they conduct hearings or deliver judgements but rather to oversee conciliations.³ Once these newly-installed judicial officers took over the running of conciliation proceedings, qualified judges, who were actually learned in the law, were able to devote themselves fully to courtroom trials.

The pre-trial conciliation procedure (*kankai*) was much utilised by parties to litigation from 1875 to 1890 but the drafting committee removed the conciliation clauses from the draft of the Civil Procedure Code, which was the first such Western-style code enacted in Japan. They instead attempted to enact a separate document entitled the Conciliation Committee Rules

² Only a very few judges had graduated from the Ministry of Justice Law School or even studied Western jurisprudence at all.

³ Ordinance Tei No. 23 (Conciliation Abridgement Act), Ministry of Justice (24 June 1884), and Imperial Order No. 40 (Regulation for Court Organizations), Ministry of Justice (5 May 1886).

(*kankai iin kisoku*), which was largely lifted from Prussian law; ultimately however these rules were not enacted either. In the following paragraphs I examine why the conciliation clauses were deleted and why the Conciliation Committee Rules were not passed.

2-1 Deletion of Conciliation Clauses from the Code

The process of writing the Civil Procedure Code⁴ began in May 1884 with Hermann Techow's Procedural Law Draft (submitted to the Minister of Justice in June 1886);⁵ Techow's involvement then ceased, but the drafting of the code itself continued from December 1887 to October 1888.⁶ Final amendments were then made to the draft's wording, and the Civil Procedure Code (Law No.29) was finally enacted on 21 April 1890.⁷ Although conciliation clauses featured in drafts, they were deleted from the final version of the code. In order to clarify why the conciliation clauses were omitted and to examine the link between this deletion and the encouragement of (or even forcing of) retirement for aged judges, we examine here the discussions regarding conciliation held

⁴ Concerning the process of civil procedure, see Yoshinobu Someno, *Kindaitekitenkanki niokeru saibanseido* (Tokyo: Keisoshobo, 1988), p.212ff; Masahiro Suzuki, *Kindai minji soshōhōshi Nihon* (Tokyo: Yūhikaku, 2004), pp.80-229; Hiroyuki Matsumoto, "Tehyō sōan no seiritsu", in *Minji soshōhō Meiji hen* (1) *Tehyō sōan 1* [*Nihon rippō shiryō zenshū* Vol.191] (edited by Hiroyuki Matsumoto and Kazuyuki Tokuda; Tokyo: Shinzansha shuppan, 2008), pp.1-36. See also Hajime Kaneko, "Minjisoshōhō no seitei: Techow sōan wo chūshin toshite", *Minjihōkenkyū* Vol.2 (Tokyo: Sakaishoten, 1954).

⁵ Eduard Hermann Robert Techow (1838-1909). *Shihōenkakushi* (Tokyo: Hōsōkai, 1939), p.92; *Hōmudaijinkanbō Shihōhōseichōsabu kanshū* (ed.), *Nihon kindai rippō shiryō sōsho* (Tokyo: Shōjihōmukenyūkai, 1985); Someno, *Kindaitekitenkanki niokeru saibanseido*, 1988, p.227; Suzuki, *Kindai minji soshōhōshi Nihon*, 2004, pp.80-106.

⁶ *Hōkibunruitaizen*, Vol.19 *Kanshokumon 10* (Tokyo: Harashobō, 1978), p.418ff; *Nihondaigaku* (ed.), *Yamada Akiyoshi den* (Tokyo: Nihondaigaku, 1963), p.753ff.

⁷ Law No.29 (Civil Procedure Code), 21 April 1890.

between Techow and the Japanese Investigation Committee for the Rules of Procedural Law (hereafter, the Investigation Committee).

Techow began drafting the code in German in May 1884. The draft was then translated into Japanese and considered at preliminary meetings chaired by the President of the Great Court of Cassation, Yofumi Tamano (1825-1886). The resultant modifications were complete by July 1885, and this modified version is hereafter referred to here as the Techow Original Draft. The Investigation Committee then took over; this was chaired by Taizō Miyoshi (1845-1908) and met more than 160 times from September 1885 to May 1886. At this point Techow made his final contributions to the drafting process, again in German. The resultant document was then translated back into Japanese and submitted in June 1886 to the Minister of Justice, Akiyoshi Yamada; it is this document that is known as Techow's Procedural Law Draft.⁸

Techow had at first refused to include a pre-trial mandatory conciliation clause in his original draft because he saw it as a waste of time, arguing that "on the assumption that 50% of the

⁸ Someno, *Kindaitekitenkanki niokeru saibanseido*, 1988, p.227; Suzuki, *Kindai minji soshōhōshi Nihon*, 2004, pp.80-106. On 29 July 1884 the Japanese Investigation Committee for the Rules of Procedural Law (hereafter, the Investigation Committee) were appointed as follows: Mikao Nanbu, Seigo Kuriduka, Motoyoshi Nakamura, Kōzō Miyagi, Takeo Kikuchi, Teruhiko Okamura, Yofumi Tamano, Nobuyuki Imamura, Seiji Komatsu and Yasunao Honda. In September 1885 ten new members of the Investigation Committee were appointed: Mikao Nanbu, Seigo Kuriduka, Kōzō Miyagi, Takeo Kikuchi, Nobuyuki Imamura, Seiji Komatsu, Yasunao Honda, Miyoji Itō, Shōichi Inoue and Renkichi Watanabe. There was little difference between the first and second groups but the members of the latter had more German ability. Shihōshō (ed.) (1939), *Shihō Enkaku shi* (Tokyo: Hōsōkai), p.92; Makiko Hayashi, "Kankai seido shōmetsu no keii to sono ronri", *Handai hōgaku* Vol.46, No.1 (1996), p.172.

total number reached settlements in conciliation, still another 50% remained, which meant local ward court judges wasted their time and efforts."⁹ However, he was persuaded by the Investigation Committee to add such a clause (conciliation prior to litigation) but in addition included clauses in his draft that detailed mediation by judges (conciliation during trials). Techow pointed out in his commentary on the original draft that there were cases which were unsuitable for conciliation or in which neither party sought conciliation.¹⁰ Even if a case was suitable and conciliation had been scheduled, a fundamental problem remained: if a party did not appear before the judge at the appointed date, the only thing the court could do was impose an administrative fine. Techow thus insisted that "a judge should have the right to encourage a party to mediate [i.e. within the adjudication procedure, not during pre-trial conciliation] or just ask/force the parties to reach a settlement at any stage of a trial or in some cases the judge should have an obligation to conciliate the case."¹¹

However, the Investigation Committee members were concerned about the abilities and practices of older judges who had not studied Western jurisprudence and who utilised conciliation even within the adjudication procedure. For this reason the committee wanted to clearly separate trial judges, who could manage the

⁹ *Techow shi soshōkisoku shuisho* (held by Hōmutoshokan, XB500-T-18, 1886; NDL Digitized Contents).

¹⁰ *Ibid.*

¹¹ *Ibid.*

adjudication procedure, from those officers in charge of conciliation. They still believed that conciliation would be necessary for the Japanese legal system even after the modern codes were enforced, but that judges should not be involved in it and should only deliver judgements within the adjudication procedure. The committee believed that such judges were too strongly wedded to the traditional means of reaching compromise between parties, and that all judges should be required to utilise Western laws and legal principles in the adjudication procedure. It may be that Techow had a rather more favourable view of the abilities of these judges than the committee did; alternatively, it may simply be that he was more interested in reaching a result, whereas the committee were more concerned with how that result was reached. As will be discussed in Section 4 of this chapter, the debate around judges' ability continued until 1899 when large-scale retirement was more firmly 'encouraged'.

During the Investigation Committee's discussions of the Techow Procedural Law Draft the coercion of plaintiffs into compulsorily submitting claims to conciliation before bringing a case to court became an issue; in reality judges often forced parties to reconcile anyway, but the draft would have formalised this. Although the clauses relating to coercion in Techow's plan were eventually dismissed by the Investigation Committee and conciliation became a voluntary procedure, at the beginning of the discussion with Techow the committee had admitted that there

was at least some utility in the coercion of conciliation:

There are advantages in using conciliation to reduce the number of lawsuits, but there is also the disadvantage of the coercion this entails. (...) Now there is a proposal to establish officers in charge of conciliation (*kankai'nin*), instead of employing judges from local ward courts. If this proposal were approved, conciliation would become suitable and appropriate for civil procedures and the court system. Therefore as a temporary measure we should agree to the draft, and then when the officers in charge of conciliation are established, all plaintiffs will have to go through conciliation before taking their claims to court. This is the best way to prevent excessive lawsuits.¹²

As mentioned earlier, it should be clearly understood that there were two forms of conciliation being debated in these discussions between Techow, the Committee and other parties. The first of these, known as *kankai*, was initiated by a petition submitted by one of the parties; it took place in court in front of a judge but outside the adjudication procedure and before any legal trial commenced. The second type of conciliation, known as *soshōjyō no wakai*, took the form of mediation by judges during

¹² "Iinshūsei minji sōsho kisoku", in Hōmu Daijin Kanbō Shihō Hōsei Chōsabu kanshū (ed.), *Nihon kindai rippō shiryō sōsho* Vol.24 (Tokyo: Shōji Hōmu Kenkyūkai, 1986), p.177.

trials, that is, it was fully part of the adjudication procedure. The Investigation Committee did not consider abolishing conciliation prior to the beginning of the trial but they were strongly opposed to judges conducting conciliation procedures once the full adjudication procedure had commenced, and gave a number of reasons for wanting to delete Techow's proposal from the original draft.

At the beginning of the Meiji era, when the Ministry of Justice was newly-established, all civil cases were concluded by the first form of conciliation discussed above (*kankai*), that is, prior to the beginning of the trial and with no attempt at adjudication. As time went by new laws were steadily proposed and enacted, and legal proceedings improved and became more formalised. Although some of the older judges were able to make the transition, many clung to their old familiar ways and still sought compromise via conciliation rather than adjudication.¹³ According to the Investigation Committee the general confusion around the details of the conciliation process often led to litigants unfamiliar with the law making their cases in an over-verbose manner and submitting too many documents, in the process often revealing their weak points. This made it harder to deliver judgements and led to delays in conducting lawsuits following failed

¹³ "Iinshūsei minji sōsho kisoku", in Hōmu Daijin Kanbō Shihō Hōsei Chōsabu kanshū (ed.), *Nihon kindai rippō shiryō sōsho* Vol.24 (Tokyo: Shōji Hōmu Kenkyūkai, 1986), p.106.

conciliation.¹⁴ Although the Investigation Committee noted in 1886 that this situation had almost been overcome, they argued nevertheless that if the conciliation article was enacted the legal system would be at the mercy of older judges who were unfamiliar with or indisposed to learn the new Western-style adjudication system.¹⁵ The committee therefore opposed conciliation held by judges and supported conciliation held by non-judges prior to any adjudication procedures or formal trials. In doing so judges could concentrate on delivering judgements, which the committee believed was true Western-style dispute resolution. Lawsuits would be instituted only after attempts at conciliation had failed; moreover, such a system would ensure that judges could not have been involved in the failed conciliation proceedings of any parties in the trials they were adjudicating in.

The Investigation Committee thus took issue with the Techow Original Draft on the grounds that the great efforts that had been undertaken since the beginning of the Meiji era in separating adjudication from conciliation would end in failure if judges were permitted to work with litigants to reach settlements during trials. They were concerned that judges would start to conciliate cases during trial instead of delivering judgements; this threatened to undermine their work in ensuring that judgements

¹⁴ Ibid.

¹⁵ Ibid.

were delivered through the application of law, not via the customs and practices of the Edo era.

2-2 Conciliation Committeeman Rules - the discarded draft

During the compilation of the Civil Procedure Code new special rules governing conciliation and conciliation officers were concurrently drafted in order to ensure that despite the exclusion from the code of clauses relating to conciliation, it would still be available as a legal means for reaching settlement. These Conciliation Committeeman Rules, which were initially marked as 'Confidential',¹⁶ were based on the Prussian "Schiedsmannsordnung" of 1879 (known in Japanese as *kankai'nin jyō rei*) and were drafted by the Ministry of Justice¹⁷ in August and September 1888.

The rules had two crucial features: firstly, they firmly differentiated conciliators from judges (Articles 3, 5 and 6), and secondly, they stipulated that these posts were to be elected by public votes in city, town and village assemblies and would be unpaid (Article 5). Furthermore, although they were to be honorary positions, the rules specified that the posts would carry official government authority (Article 3). Article 8 noted that the conciliation itself could be held in a committeeman's own house or at another location if advance notice was given to the public. The conciliation committeeman had to be between thirty and sixty

¹⁶ "Botsukoku kankai'nin jyōrei" (held by Hōmutoshokan, XB100-S3-5).

¹⁷ "Kankai'iin kisoku" (held by Kokugakuindaigaku goinbunko, B-2248).

years old and to have lived within the conciliation ward for over two years (Articles 4 and 11). If he refused to carry out his assigned duties he could be punished by a suspension of his civil rights and a penalty residence tax could be imposed upon him (Article 13). The jurisdictional wards were to be defined by the relevant local assemblies (Article 2), with conciliation expenditure to be covered by the local budget (Article 33).

The reasons for the draft Conciliation Committeeman Rules not ultimately being passed can be understood through analysing the letters and statements of the Director-General of the Cabinet Legislation Bureau, Kowashi Inoue (1844-1895), who opposed their enactment. He sent letters on 12 and 18 August 1888 respectively to Warau Imamura (1846-1891),¹⁸ Chief of the third department of the Cabinet Legislation Bureau, and Akiyoshi Yamada (1844-1892), the Minister of Justice, asking the recipients not to present the bill to the Imperial Diet (parliament). The second letter, to Yamada, ran as follows (paraphrased):¹⁹

(...) Although Conciliation Committeeman Rules were unavoidable due to the deletion of conciliation from the Civil Procedure Code, they will exert a negative influence

¹⁸ "Yosakoi Kōchi rekishi komorebi" (<http://noburu.blog92.fc2.com/blog-entry-34.html>).

¹⁹ Nihon Daigaku Daigakushi Hensanshitsu (ed.), *Yamada Hakushaku-ke monjo* Vol.2 (Tokyo: Nihondaigaku, 1991), pp.138-139. The address on the envelope was "Yamada shihō daijin dono, shinten, Inoue Kowashi" (To Minister of Justice Yamada, confidential, Inoue Kowashi). See also Inoue Kowashi denki hensaniinkai (ed.), *Inoue Kowashi den Shiryōhen* Vol.4 (Tokyo: Kokugakuindaigaku toshokan, 1971), pp.654-655.

on a situation in which local political parties are already struggling with each other, and lead to new conflicts; conciliation will not last for more than a few years if the Conciliation Committeeman Rules are put into practice. Furthermore, a conciliation committeeman is a kind of judge. Germany has had long experience of this but when France adopted a system of publicly-elected judges it soon modified it to a system of officially-appointed judges, due to the negative impact of this system. The history of this system should be taken into consideration.

I would be reluctant to criticise this draft in the Imperial Diet, if it was referred there.

Consequently, I have expressed my opinion unreservedly.

Yours very respectfully,

Kowashi 18 August

Minister of Justice Esq.²⁰

In Inoue's first letter, to Imamura, he had outlined four reasons for his disagreement with the conciliation committeeman system. The first three points were almost the same as those stated in the above letter to Yamada, but the fourth ran as follows:

²⁰ Nihon Daigaku Daigakushi Hensanshitsu (ed.), *Yamada Hakushaku-ke monjo* Vol.2 (Tokyo: Nihondaigaku, 1991), pp.138-139.

If you thought the conciliation procedure was necessary, you should have appointed judges for conciliation in line with our former system. In the Civil Procedure Code, however, the clauses relating to conciliation were deleted following the decision that conciliation should no longer be used. Conciliation should henceforth not be regulated by the authorities, it should be left to those whom people freely choose to be their arbitrators. If you are in agreement, I will bring this to the attention of the Minister of Justice and the Cabinet. If the Cabinet do not accept the advice, it will be left to the Imperial Diet. It might be awkward for the Cabinet if a draft which the Cabinet Legislation Bureau completely disagrees with was presented to the Imperial Diet. I would like to meet and discuss this when I return to Tokyo. Sincerely, Kowashi. 12 August.²¹

The letter to Imamura makes it clear that the Cabinet Legislation Bureau (for which read Inoue, its director) completely disagreed with the draft and was planning to state its opposition to both the Minister of Justice and the Cabinet in order to avoid the draft being laid before the Diet. It can be assumed from the fact that Inoue sent the subsequent letter, to Minister of Justice

²¹ Inoue Kowashi denki hensaninkai (ed.), *Inoue Kowashi den Shiryōhen* Vol.4, 1971, p.326. Kino Kazue, *Inoue Kowashi kenkyū* (Tokyo: Zoku Gunshoruijyū kanseikai, 1995), p.157 notes that Inoue and Imamura had known each other since 1873.

Yamada, that Imamura had agreed to Inoue's suggestion of a plenary meeting at the Cabinet Legislation Bureau.²² The two letters prove that Inoue was seeking to persuade certain members of the government not to present the draft version of the Conciliation Committeeman Rules to the Diet.²³

In addition to the two letters discussed above, a document entitled 'Conciliation Committeeman Proposal', found in a collection of Inoue's books and papers, sheds further light on Inoue's opposition:²⁴

(...) According to the original draft, conciliation committeemen are elected by popular vote. Therefore, although no one knows what sort of person may become a committeeman, it seems certain that the majority will not have any legal knowledge. In general the duty of conciliation could not be discharged if the conciliator lacks any knowledge of law, because the conciliator is required to make an accurate forecast of judgements in order to make both parties consider the advantages and disadvantages of the case coming to trial.²⁵

²² Article 9 of the Legislation Bureau Organization (Edict No.91, 12 June 1890) stipulated that important cases were to be decided by "plenary meeting". See also Naikakuho-seikyokushi hensaninkai (ed.), *Naikakuho-seikyokushi* (Tokyo: Naikakuho-seikyokushi hensaninkai, 1974), p.22.

²³ I would argue that the main reason for the 'kankai'iin' system not being established was Inoue's opposition, which led to proposals for a jury system being withdrawn from the draft in 1880. See Nobuyoshi Toshitani, "Tennoseihotaisei to baishinseidoron", *Nihonkindaiho-seishi kenkyukai* (ed.), *Nihonkindaikokka no hokozo* (Tokyo: Bokutakusha, 1983), p.555.

²⁴ "Kankai'iin kisoku an" (held by Kokugakuindaigaku goinbunko, B-2302). Mr. Kazue Kino kindly confirmed that this document was written by Inoue, as it has his signature.

²⁵ "Kankai'iin kisoku an" (held by Kokugakuindaigaku goinbunko, B-2302).

To sum up, Inoue disagreed with the draft for three reasons: 1) based on how much local political parties were already arguing with each other, he held that public elections in city, town and village assemblies would only increase this rivalry; 2) as conciliation work required legal knowledge and involved considerable paperwork, he argued that an honorary unpaid committeeman would not be able to manage the work and that appointed judges should instead be charged with such duties if conciliation was truly necessary; and 3) Inoue believed that conciliation should not be established by government diktat but rather should be left in the hands of commoners to freely choose their arbitrators themselves.

As noted above, Inoue strongly disagreed with holding public votes to appoint conciliation committeemen because he was afraid that people lacking legal knowledge could be elected as arbitrators, which he saw as judicial positions. His aversion to the lay judge system dated back to the drafting and examination of the 1880 Code of Criminal Instruction, when he had opposed the inclusion of a jury system in the code and succeeded in deleting those clauses concerning juries.²⁶ If it was decided that conciliation committeemen were absolutely necessary, Inoue proposed employing local ward court judges. However, his preferred solution was to abolish the conciliation system altogether and

²⁶ Toshitani, "Tennōseihōtaisei to baishinseidoron", 1983, p.520.

empower people to select their own arbitrators, rather than have a system imposed on them by the authorities. Inoue firmly believed that people should obey and keep local usages and customs (known as *Sitte* in German) as the law of the private civil world, and that the nation-state should not seek to police these through national laws or via the regulation of rights and duties; this, he held, was the best way to guarantee that Japan's people led 'natural' lives.²⁷ In order to discourage disputes from developing into legal cases, he doesn't seem to have supported any institutions for dispute resolution other than judicial courts. For three decades following the enforcement of the Civil Procedure Code²⁸ there was thus no court-based conciliation procedure, such as the contemporary alternative dispute resolution systems used in the US and other Western nations, and there were no organs charged with administering any kind of conciliation.

²⁷ Yūkichi Sakai, *Inoue Kowashi to Meiji kokka* (Tokyo: Tokyo Daigaku shuppankai, 1983), p.75, p.94, p.108, pp.114-118.

²⁸ Both the 1890 Civil Procedure Code and 1890 Criminal Procedure Code were enforced from 1891 onwards.

Section 3: Non-enforcement of Attorney Utilisation

This section discusses why pro-se litigants were allowed to represent themselves in Japan (and still are, even in the Supreme Court) and why criminal defence by attorneys was not made mandatory in the Criminal Procedure Code. The common reason in both civil and criminal law seems to have been the strong belief that parties to litigation should have their right to self-determination protected.

It is important to understand the distinction between mandatory attorney representation and pro-se litigation. The former is a system or principle that requires parties to litigation to be legally represented by an attorney. Such a system does not recognise a private party's ability to be able to independently participate in informed oral arguments, and thus does not authorise it; the same system also allows attorneys to bring litigation on behalf of clients to a civil court. This contrasts with pro-se litigation, which acknowledges the ability of independent participants to be able to conduct oral arguments. In civil trials in Japan there is no requirement for any party involved in litigation at any court level, including the Supreme Court, to enlist the services of an attorney. It is unusual for countries with Western-style legal systems to allow a party to litigation to have no legal representation, although some countries admit pro-se litigants in lower courts or tribunals.²⁹

²⁹ Yoshinobu Someno, *Saibanhōriron no tenkai: Minji soshōhō no shikaku kara no*

This section analyses the arguments for and against pro-se litigation which were held before the enactment of the Civil Procedure Code. Although the new law was based upon the German Civil Procedure Code, which didn't allow for pro-se litigation in higher courts, some members of the Civil Procedure Code Drafting Committee, such as Seiji Komatsu (1848-1893), Mikao Nanbu (1845-1923) and Yasukowa Matsuoka (1846-1923), strongly opposed this. They wanted to allow litigants to represent themselves, a feature which could be found in the Anglo-American system, and so the concept of mandatory attorney representation was deleted from the draft of the Civil Procedure Code in a meeting on 20 January 1888.

Just prior to this draft meeting Taizō Miyoshi, the chair of the Investigation Committee, had made detailed comparisons of two sets of oral arguments both based on the Civil Procedure Code draft, namely those made by attorneys and those made by pro-se litigants.³⁰ Based on his results Miyoshi argued that the two types of oral proceeding had become a completely different type of litigation. In those cases where attorneys made the oral arguments the initial statement was made without any omissions from the submitted written petition, starting with the initial factual statements and proceeding right through to the legal arguments. However, even though their initial written petitions were usually adequate, the statements made by pro-se litigants tended to have

kenkyū (Tokyo: Keisō shobō, 1979), p.118.

³⁰ In certain cases both attorneys and litigants had begun utilising the code in court in its draft form prior to its enactment and enforcement.

many deficiencies and their cases took far longer at the oral argument stage. Miyoshi concluded that allowing litigants to represent themselves as pro-se litigants did not benefit the parties themselves. Court procedures took much more time if the pro-se litigant had little legal knowledge or experience, as they were often fearful of making inappropriate or incorrect statements.³¹

However, Komatsu and Nanbu stated that the shortage of attorneys in Japan and the limited financial resources of many of those seeking to bring cases to court meant that many parties weren't able to ask attorneys to represent them in litigation. These two problems were particularly serious in rural areas.³² In addition, Komatsu pointed out that Isaac Albert Mosse (1846-1925), a German legal adviser to the Ministry of Justice, had asserted that mandatory legal representation by attorneys was unnecessary for civil litigation, even though the German Civil Procedure Code had stipulated its necessity.³³

Matsuoka concluded that "depriving parties of the right to litigate on their own cannot be justified just because it may be advantageous for them to ask attorneys to legally represent them."³⁴ He argued that it was the right of litigants and other parties to represent themselves in court without the assistance

³¹ "Minjisoshōhō sōan giji hikki", *Nihon kindai rippō shiryō sōsho* Vol.22 (Tokyo: Shōji hōmu kenkyūkai, 1985), p.151.

³² *Ibid*, p.160.

³³ *Ibid*, pp.168-170.

³⁴ *Ibid*, pp.176-178.

of an attorney; the government should not deny them of this right and force them to employ an attorney to carry out their litigation. Matsuoka's argument seems to have convinced the code's compilers. The right to self-determination was difficult to argue against, and the committee consequently abandoned their insistence on the compulsory utilisation of attorneys. This issue was addressed by Mosse's drafting of a pro-se litigation clause, which was then submitted to the committee on 13 April 1888 and subsequently became law as Article 63 of the 1890 Civil Procedure Code.

The issue of mandatory attorney representation was again discussed by the Chief Investigators' Civil Procedure Code Amendment Committee from 18 November 1914 to 17 February 1915.³⁵ The committee's opinion was that the introduction of such a system would represent an improvement over the current system if the average standard of attorneys could be raised. Committee members Yoshimasa Matsuoka and Washitarō Nagashima respectively said that if the proposed new attorney system was an improvement on the current system and if skilled attorneys would be involved, such a system should be established. The committee thus recommended that a mandatory attorney representation system should be introduced into the appeal courts and the Supreme Court.³⁶ However, this recommendation was not ultimately included in the final draft;

³⁵ Yoshinobu Someno, *Saibanhōriron no tenkai: Minji soshōhō no shikaku kara no kenkyū* (Tokyo: Keisō shobō, 1979), pp.118-125.

³⁶ *Minjisoshōhō shusa iinkai nisshi* (National Diet Library, XB500 M1-1(ndljp/pid/1367836)), pp.12-17; Yoshinobu Someno, *Saibanhōriron no tenkai: Minji soshōhō no shikaku kara no kenkyū* (Tokyo: Keisō shobō, 1979), p.120.

other committee members' opinions, such as that of Atsushi Koyama ("I think that there is no prospect of it passing because this harms the public's interests") and of Yoshimichi Hara ("I am in favour of this in principle, but in reality it is unlikely to pass through the House of Lords"), seem to have been more persuasive to the committee.³⁷

The committee's discussions on mandatory attorney representation can thus be summarised in the following manner. On the one hand there was a widely shared opinion that those who want to take a case to court on their own without an attorney should be allowed to do so, and that this should be protected as their right. On the other hand the committee's members, as litigation professionals, held that parties should consider asking an attorney to legally represent them during the oral argument stages of the proceedings. This was not only for reasons of court efficiency but also for the benefit of litigants, as it reduced their costs; in other words, the cost of employing an attorney was outweighed by the extra costs that non-professional litigants incurred in conducting their own preparation and court arguments. Despite this however, the overarching belief was that parties to litigation should have the right to self-determine the form of their participation.

A similar argument was also made in the discussions concerning the defence counsel in the drafting of the Criminal

³⁷ *Ibid*, pp.121-122.

Procedure Code, which centred on whether the defence counsel in criminal trials must always be an attorney or, if the counsel was a team, must contain at least one attorney. It was proposed that if an attorney was involved, any other counsels would not have to be attorneys; this however was not stipulated in the resultant code. Even under the modern-day Japanese system, although a defence counsel must normally also be a lawyer, it is still possible in certain cases for a defence counsel to be unqualified: "In a summary court, family court or district court, any person who is not a lawyer may, with the permission of the court, be appointed to be a counsel; provided, however, that this shall apply, in a district court, only when there is another counsel appointed from among lawyers."³⁸

According to Article 179 of the Criminal Procedure Code, the accused could ask a defence counsel to make his argument on his behalf. A counsel could be chosen by the accused from those attorneys attached to the court; however, with the permission of the court, it was possible to be appointed a counsel even if non-credentialed.³⁹ This provision was adapted from the 1880 Penal Procedure Code (Article 266); the only difference was the name of the profession itself, which was 'legal advocate' (*daigen'nin*) in the earlier code and 'attorney' (*bengoshi*) in the latter. A number of commentaries and guidebooks for legal professionals were

³⁸ Section 2 Article 31, Criminal Procedure Code (Law No.131/1948, as last amended by Law No.74/2011).

³⁹ Criminal Procedure Code (Law No. 96, 7 October 1890).

published during the period; some of these sought to clarify Article 179. According to Shirō Isobe the clause provided that, in principle, the defence counsel should normally be an attorney,⁴⁰ but that if the accused didn't trust attorneys or lacked funds, a court couldn't prohibit the accused from delegating authority to someone else whom he or she trusted to be a defence counsel.⁴¹ Other works published during the period noted that although any attorney appointed should normally be a Japanese man, with the permission of the court a woman or foreigner could be assigned.⁴²

A common stance adopted by many of those who opposed the mandatory appointment of an attorney was that even if the court had the final authority to allow the accused to appoint a defence counsel who was not an attorney, pro-se litigants in civil cases should have *the right to ask* for anyone to be their defence counsel, regardless of that counsel's gender, nationality or (lack of) legal qualification, and also regardless of the financial position of the defendant. It seems to have been the shared view of many in the public and private sectors that people's problems should and could be addressed via decisions made by the people affected; this was reflected in the preparatory legislation meetings for the Civil and Criminal Procedure Codes.

⁴⁰ Shirō Isobe, *Keijisoshōhō kōgi gekan* (Tokyo: Yao shoten, 1893 [1890]), pp.12-14. In this textbook Isobe seeks to explain why defence counsels are necessary for criminal trials.

⁴¹ Shirō Isobe, *Keijisoshōhō kōgi gekan* (Tokyo: Yao shoten, 1893 [1890]), p.14; Eiichi Makino, *Keijisoshōhō* (Tokyo: Yūhikaku, 1918), pp.74-76.

⁴² Matsutarō Itakura, *Keijisoshōhō gengi* (Tokyo: Ganshodo shoten, 1912), p.1124; Naomichi Toyoshima, *Keijisoshōhō shinron zen* (Tokyo: Nihon daigaku, 1905), pp.181-182; Raisaburo Hayashi, *Keijisoshōhō ron* (Tokyo: Ganshodo shoten, 1916), p.259.

This shared consciousness of the right to self-determination, however, should not be taken to be entirely consistent with modern conceptions of legal rights. Any discussion of the notion of self-determination should be firmly placed within its context, time and place, in this case the evolving legal system of Meiji era Japan. Section 1 of this chapter examined Kowashi Inoue's opposition to the draft of the Conciliation Committeeman Rules on the basis of this same consciousness; Inoue had argued that conciliation should not be regulated by the government and should be left to arbitrators chosen freely by the ordinary litigants involved in a case. However, there is a clear difference between the traditional consciousness of the Edo era and modern legal conceptions of self-determination and freedom. The Edo understanding stressed the importance of acting according to one's inclinations, *katte shidai* or *kamainashi*, and this was clearly enunciated by the Edo era authorities in their edicts, but there was no empowerment of the various parties; for example, there was no attempt by the state to help poorer people gain access to legal services through subsidisation. Modern conceptions of the relationship between the state and the individual in such matters allow people to act freely and have responsibility for making the decisions that affect them. However, the definition of freedom in the Edo and early Meiji eras was that people were placed outside the scope of the state's protection.

This section has examined the repudiation of mandatory

attorney representation and the approval of the right of the accused to appoint non-credentialed defence counsels. In the Meiji era there was no discussion of the state establishing a system to aid with attorneys' fees or providing legal aid to support litigants; it may not even have occurred to anyone that the state could or should do this.⁴³ In the civil litigation arena the government prepared two options for those parties unable to afford legal representation: official recognition of pro-se litigation and the provision of inexpensive non-credentialed practitioners. Article 63 of the Civil Procedure Code stipulated that if a plaintiff or defendant could not represent himself or herself, an attorney could be appointed to this role. In the absence of an attorney the plaintiff or defendant could ask a relative or employee familiar with litigation procedure to represent them in court, and if that were not possible then anyone else with the requisite familiarity could fill the role. In a ward court however, even when an attorney was employed by the plaintiff or defendant, either party could appoint a relative or employee as their

⁴³ It seems that self-determination concerning dispute resolution in the UK is currently protected by governmental financial support; Hiroshi Takahashi, "Towards an Understanding of the 'Japanese' Way of Dispute Resolution: How is it Different from the West?", in *The Changing Role of Law in Japan: Empirical Studies in Culture, Society and Policy Making* (edited by Dimitri Vanoverbeke, Jeroen Maesschalck, David Nelken and Stephan Parmentier; Cheltenham: Edward Elgar, 2014), pp.107-108. "The UK regime has strongly led disputants to negotiate resolution, with or without using ADR. It is true that there are threats of sanction imposed by courts, but parties can and should choose their course of action independently without the direct intervention/supervision of judges. Conversely, the Japanese scheme seems to try to lead disputants to judiciary-initiated proceedings including both litigation and mediation when the disputants come to the door of the court. A consent-based settlement is expected to be reached in court under the supervision of a judge. These are referred to as 'voluntary' resolutions of dispute, as far as they are based on the parties' consent. Compared with the UK, however, this is closer to 'superintended voluntarism'".

representative assuming they had a measure of familiarity with litigation. However, although the court could not prevent any non-credentialed practitioners from entering the court in the first instance, they did have the power to prohibit litigation proceeding if the representative was not qualified, and they could set a new date and order the parties to attend with representatives who were fully certified (Article 127).⁴⁴

Thus despite the strong desire to Westernise Japan's legal systems, the government decided to add a clause to the first modern Civil Procedure Code (1890) that allowed for non-credentialed legal practitioners.

⁴⁴ Unlike Articles 63 and 127 of the 1890 Civil Procedure Code, Article 79 of the 1926 Civil Procedure Code limited non-credentialed legal representation in local ward courts.

Section 4: Enforcement of Retirement

In this section we will discuss how the Ministry of Justice addressed the modernisation of the profession of 'lawyer' and how the judicial system was modernised following the enactment of the Judge Appointment Rules of 1884. In continental (civil) law countries, such as Japan, judges were, and still are, in the unusual position of simultaneously being part of the state bureaucracy and the legal profession. The judge is a lawyer, responsible for every single trial he or she participates in, but at the same time is also a judicial bureaucrat paid for from the state budget. Before World War II the judicial bureaucracy was headed by the Minister of Justice; the Chief Justice of the Great Court of Cassation was one position lower. The authority of the ministry over the judges and court system was very clear; for example, judges of the Great Court of Cassation were ranked lower within the judicial bureaucracy than the directors of the four Courts of Appeal.⁴⁵ In civil law countries the guarantee of judges' continued employment is important in preserving the independence of the judiciary; in Meiji Japan it seems to have been a means to resolve any conflicts occurring from the dual status of judges as both lawyers and bureaucrats, and was thus essential for preserving judicial independence.

The guarantee of life tenure for Japanese judges was first outlined in the Court Organisation Regulations of 1886, then

⁴⁵ There are now eight Courts of Appeal in Japan.

further detailed in the Meiji Constitution and the Court Organisation Act.⁴⁶ The Meiji Constitution notes the following:

The judges shall be appointed from among those who possess proper qualifications according to law. No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment. Rules for disciplinary punishment shall be determined by law.⁴⁷ (Article 58 of the Meiji Constitution)

Hirobumi Ito made the following comments on this article:

In order to remain impartial and fair in trials judges ought to occupy an independent position free from the interference of power, and should never be influenced by the interests of the mighty or by the heat of political controversies. Accordingly they shall be entitled to hold office for life, unless dismissed from the service by a criminal sentence or by the outcome of a disciplinary trial. Disciplinary rules applicable to judicial functionaries are fixed by law and enforced by the courts. No interference of any chief of an

⁴⁶ Article 12, Imperial Order No.40 (Court Organisation Regulations), 4 May 1886.

⁴⁷ Article 58, Meiji Constitution (Constitution of the Empire of Japan), 11 February 1889. Hirobumi Ito (translated by Miyoji Ito), *Commentaries on the Constitution of the Empire of Japan* (Tokyo: Igirisu-hōritsu Gakkō, 1889), pp.104-105 (<http://jalii.law.nagoya-u.ac.jp/project/jaconst>).
<http://jalii.law.nagoya-u.ac.jp/const/index.html>

administrative office is allowed. Such is the guarantee which the Constitution provides for the independence of judges.

....

All details as to suspension from office, *hishoku* (temporary retirement from active service on one-third pay), transfers and retirement on account of age shall be mentioned in law.⁴⁸

Article 67 of the Court Organisation Act also provided for the life tenure of judges, while Article 73 provided that "no judge shall be removed or be transferred, or be suspended or dismissed from his position or have his salary reduced, against his will, unless by way of criminal sentence or disciplinary punishment."⁴⁹ Article 74 stipulated that if a judge became unable to perform his duties due to mental or physical incompetence, the Minister of Justice can order his retirement via a resolution made in a general meeting of the Court of Appeal or the Great Court of Cassation. Article 75 stipulated that judges could be temporarily suspended from active service on half-pay; when there were no available positions the Minister of Justice had the authority to make him wait for a vacancy.⁵⁰ But Ito says that temporary suspension (*hishoku*) is on one-third pay, this guarantee of judges' status is far stronger than that found in contemporary Japan.⁵¹

⁴⁸ *Ibid.*

⁴⁹ Article 73, Law No.6 (Court Organisation Act), 8 February 1890.

⁵⁰ Article 74 and 75, Law No.6 (Court Organisation Act), 8 February 1890.

⁵¹ Article 80 Section 1 of the Constitution of Japan stipulated as follows: "The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. All such judges shall hold

Minister of Justice Akiyoshi Yamada insisted that the constitutional clause protecting judges' guaranteed status should be respected and not be weakened simply because some judges had not passed the judge's appointment examination or were not qualified as lawyers.⁵²

The Ministry of Justice as well as the government seem to have recognised that the articles guaranteeing the status of judges (67, 73-75) were important and well worthy of protection. However, in the late 1890s, during the process of modernising the judicial system, this constitutional guarantee of judges' status seems to have been contravened by the forced retirement of judges. We will now examine the discussions held by lawyers regarding this issue.

Until the late 1890s judges were appointed from a diversity of backgrounds, albeit usually following a recommendation and interview.⁵³ For example, people who had obtained law degrees abroad or those who had studied in the law schools of the Ministry of Justice or of the University of Tokyo (Imperial University) and had been practicing in trials from the early Meiji era were appointed as court judges; people who had fought as members of the government forces during the battles of the Meiji Restoration

office for a term of ten years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law."

⁵² Masatsugu Inada, *Meiji kenpo seiritsushi, gekan* (Tokyo: Yūhikaku, 1987), p.715; Seiichirō Kusunoki, *Meiji rikkensei to shihōkan* (Tokyo: Keiō tsūshin, 1989), p.261.

⁵³ Takashi Katō, "Meiji zenki shihōkan ninyōsei no ichi danmen: Meiji jūnen Hiroshima saibansho no baai", *Shūdō hōgaku* Vol.23, No.2 (2001), pp.5-8.

and the following skirmishes were also appointed as judges as a reward for their service. This wide variety of appointments continued until 1877, when the last samurai rebellions were completely quelled.

As late as January 1892 only six of the 31 judges in the Great Court of Cassation (the pre-war Supreme Court) had studied Western jurisprudence in the Ministry of Justice or University of Tokyo law schools.⁵⁴ This gradually increased to 11 out of 29 judges by January 1897. Between 1898 and 1899 many of those lacking a knowledge of Western jurisprudence retired or resigned.⁵⁵ By January 1902 15 out of the 26 judges in the Great Court of Cassation had studied Western law, and this then rose more quickly to 25 out of 28 by January 1905. No judges who had graduated from private law schools were appointed to the Supreme Court between 1892 and 1905, and very few thereafter.⁵⁶

As we have seen in the previous section, the Ministry of Justice's view was that a judge should be someone capable of writing a judgement based on sound legal knowledge; they thus felt justified in 'retiring' those judges who lacked sufficient, or in some cases any, knowledge of Western jurisprudence. The government and the ministry began to weed out these older judges from the late 1890s onwards, just before the enforcement of the Civil and

⁵⁴ Seiichirō Kusunoki, *Meiji rikkensei to shihōkan* (Tokyo: Keiō tsūshin, 1989), pp.298-299; Yoshihiro Misaka, *Kindai Nihon no shihōshō to saibankan: 19-seiki Nichifutsu hikaku no shiten kara* (Osaka: Osaka daigaku shuppankai, 2014), pp.180-181.

⁵⁵ Seiichirō Kusunoki, 1989, pp.282-293.

⁵⁶ Seiichirō Kusunoki, 1989, pp.298-299; Yoshihiro Misaka, 2014, pp.180-181.

Commercial Codes in 1898 and 1899 respectively:⁵⁷ 55 judges (were) retired in 1893, 19 in 1894, 18 in 1895, 18 in 1896, 30 in 1897, 73 in 1898 and 60 in 1899. Seiichirō Kusunoki has surmised that this wide variation in annual retirements indicates that the government and/or the Ministry of Justice might have particularly encouraged retirement in 1893 and again in 1898-99.⁵⁸ Kusunoki also noted that a member of the Diet had submitted a questionnaire to the government in May 1894 enquiring as to why the number of retired judges had suddenly increased in late 1893; other questionnaires and opinions relating to the same topic, including some from the Japan Lawyers' Association, were also submitted to parliament around the same time.

On 20 October 1890 the *Asahi Shinbun* reported that a Ministry of Justice officer had noted that if the resignations submitted by judges following the introduction of the ministry's deselection of old judges were all ratified, the total number of retirements would reach the 150 people scheduled in the ministry's plan.⁵⁹ According to the officer the number of regular judges and prosecutors would be set at 1,546 people and therefore if 200 assistant judges were appointed the resourcing would then be at a sufficient level, assuming the number of trials remained at the 1890 level.⁶⁰ Furthermore, he noted that along with the enforcement

⁵⁷ Note that the Civil Procedure Code and Criminal Procedure Code were enacted in 1890, considerably earlier than the substantial codes embodied within the Civil Code and Commercial Code, which were 1898 and 1899 respectively.

⁵⁸ Seiichirō Kusunoki, 1989, pp.254.

⁵⁹ *Tokyo Asahi Shinbun*, 20 October 1890.

⁶⁰ *Tokyo Asahi Shinbun*, 20 October 1890.

of the new codes and the revised treaties, further large-scale forced resignation of old judges would be needed at some point.

However, it soon became clear that even judges of the lowest courts wouldn't resign easily, as they were able to shelter behind their guaranteed status as stipulated in the Constitution. Finally, following a decision made by Minister of Justice Arasuke Sone (1849-1910) in 1898, the three Chief Justices of the Appeal Courts, the Public Prosecutor General and the three judges of the Great Court of Cassation issued letters of resignation to the Ministry of Justice.⁶¹

Large-scale 'encouraged' retirement, which was actually forced retirement in all but name, was carried out from October 1898 to January 1899 in particular, as described above. So as not to violate the Court Organisation Act and the Constitution the methods used were to encourage leave of absence and to offer incentives such as an increase in pensions attached to a grade rise. An example of the latter was the case of a director judge in a local ward court who was appointed as a Tokyo Court of Appeal judge on 16 December 1898 and then retired later the same day. The official pension law stipulated that pensions were determined by the final salary (as well as years in service), so this one-day promotion was attractive to many older judges.⁶² The enactment of the Court Organisation Act also enabled the Minister of Justice

⁶¹ *Tokyo Asahi Shinbun*, 28 June 1898.

⁶² Seiichirō Kusunoki, 1989, p.200.

to order temporary retirement if it was felt a judge could no longer fulfil his duties due to illness or for other reasons. In such cases those who had served as judges for over 15 years were paid one-third of their current salary, compared to the approximately one-seventh or less of their salary that their pensions equated to.⁶³ The temporary retirement method was used to persuade certain more powerful judges to step aside, such as those who had served their nation during the Meiji Restoration.⁶⁴ These methods show how keen the government was to encourage these old judges to retire. However, for those who still would not resign, the Ministry of Justice was prepared to order their transfer. Two judges (Toshinori Chiya, a judge of the Great Court of Cassation, and Wakatsu Bessho, a judge of the Kōfu District Court) claimed that their transfer instructions violated the Court Organisation Act (Article 73); they did not obey their orders and took their claims to court, arguing that their transfers were effectively demotions. Judge Chiya died from an illness during his appeal but Judge Bessho succeeded in his claim to the Great Court of Cassation on 22 October 1896.⁶⁵ He then submitted his resignation and this was accepted on 14 December 1896; this was common in such labour disputes and was presumably based on a sense of foreboding regarding staying on in a position for which one had been deemed

⁶³ Imperial Order No.254, 18 October 1890. *Kōbunruishū* dai 14 hen, Meiji 23 nen, dai 5 kan, kanshoku 2, shokuseishōtei2 (National Archives of Japan: 00451100-020).

⁶⁴ Seiichirō Kusunoki, 1989, p.201.

⁶⁵ *Ibid*, pp.45-85, 87-113.

surplus to requirements. After these trials the Ministry of Justice ceased using the transfer policy to force retirements, instead choosing to offer targeted incentives to particular individuals. The way was clear for a new wave of 'encouraged retirements' to begin, resulting in the 1898-1899 rise in the numbers of judges retiring.

The reaction of the Japan Lawyers' Association to this encouraged retirement policy was revealing, as it demonstrated attorneys' attitude to judges' guaranteed status. According to Yoshihiro Misaka⁶⁶ the association actually strongly supported the government's policy. Attorneys had criticised some judges and prosecutors for serving without having modern legal knowledge or understanding the provisions of contemporary law. Attorneys argued that some trials carried out by judges lacking this knowledge and these skills had resulted in violations of people's human rights, and as such they supported the removal of such people from the courts and their replacement by judges with the relevant knowledge. The association and individual attorneys therefore decided to support the Ministry of Justice's policy of 'encouraged' retirement during this period, even if this violated judges' guaranteed status and somewhat infringed the independence of the judiciary.

In fact, leading lawyers such as Makoto (Chū) Egi and Taizō

⁶⁶ Yoshihiro Misaka, *Kindai Nihon no shihōshō to saibankan: 19-seiki Nichifutsu hikaku no shiten kara* (Osaka: Osaka daigaku shuppankai, 2014), pp.195-200.

Miyoshi (who had earlier served as the chair of the Japanese Investigation Committee for the Rules of Procedural Law) had instigated discussions around the topic of these aged judges in 1897, a year before the 'forced retirements' restarted.⁶⁷ They criticised the fact that court affairs had not been carefully supervised and that official directives and admonitions for judges found wanting had not been issued in compliance with Article 136 of the Court Organisation Act; attorneys argued that the Ministry of Justice should strengthen this supervision. In addition, in order to improve the quality of trials, lawyers argued that courts should make better use of the enquiry-order system that linked them to the Ministry of Justice, as this would partially compensate for the lack of judges' skills in law and in the interpretation of regulations. Judging by the contents of the annual magazines issued by the Japan lawyers' Association, there was little discussion of encouraging judges themselves to lead these reforms.

Teruhiko Okamura (1856-1916; called to the bar in the UK in 1880) and Tomotesu Asakura (1863-1927) took a different tack, arguing that the Ministry of Justice should be abolished.⁶⁸ Since the development of the judicial system and its various codes was complete, they believed that the work carried out by the Ministry of Justice should be left to the Great Court of Cassation and to

⁶⁷ *Ibid*, pp.201.

⁶⁸ "Shihōshō wo haishi suruno ken" (Vol.9, 1898), *Nihon bengoshi kyōkai rokuji: Meiji-hen*, Vol.2 (Reprinted ed. Tokyo: Yumani Shobō, 2004), pp.421-453.

each court. They argued that to entrust the protection of the civil rights of litigants and the supervision of each court and the Prosecutor's Office to the Minister of Justice was a risk and potentially harmful. Furthermore, they criticised the Ministry of Justice's arguments for expanding judicial powers vis-a-vis administrative or legislative powers by arguing that such expansion was the responsibility of the entire nation, and should be carried out via parliament and ultimately by lawyers and the various courts themselves.⁶⁹ Okamura claimed that the two great hopes of the lawyer community, namely for fair and honest judges who were independent from beginning to end, and for the Minister of Justice to find ways to retire older judges, were not compatible. Despite Okamura's view however the opinion of the Japan Lawyers' Association was that the Ministry of Justice and its minister were justified in their attempts to facilitate the retirement of those old judges who lacked an understanding of even contemporary Japanese law, let alone Western law.⁷⁰

After the older judges were forced to retire many of them joined the bar; Okudaira mentioned that the bar at that time became "a mixture of wheat and chaff".⁷¹ This opinion demonstrates that attorneys' pride and their objective evaluations concerning

⁶⁹ "Shihōshō wo haishi suruno ken" (Vol.11, June 1898), *Nihon bengoshi kyōkai rokuji: Meiji-hen*, Vol.3 (Reprinted ed. Tokyo: Yumani Shobō, 2004), pp.34-36.

⁷⁰ Shunpei Uemura wrote an article concerning old judges forced into retirement: "Genkon no shihō seido (2)" (Vol.7, February 1898), *Nihon bengoshi kyōkai rokuji: Meiji-hen*, Vol.2 (Reprinted ed. Tokyo: Yumani Shobō, 2004), pp.192-193.

⁷¹ Masahiro Okudaira, *Nihon bengoshi shi* (Tokyo: Gan'nandō shoten, 1914), pp.809-910.

their qualities as lawyers and their superior abilities to those of judges had remained constant throughout these years; as always, this feeling of superiority could be traced back to the introduction of the bar examination in 1876 and the deliberate limits placed on the number of successful applicants to the profession.⁷² Although a judges' appointment examination had been enacted in 1884 and finally introduced in 1885 it could have no immediate effect in increasing the number of qualified judges serving in court because there were only a finite number of positions available; even the strongest successful candidates had to wait until a serving judge retired (either through 'encouragement' or independent decision) or died. This enforced wait before assuming a position must have made it even harder for judges to develop the same sense of common consciousness that attorneys had managed to so successfully foster.

⁷² Chapter 4.

Chapter 6 Monopolisation: In- and Out-of-Court Legal Services

Section 1: Introduction

Section 2: Monopolisation of In-Court Legal Services

Section 3: Differentiation of Out-of-Court Legal Services

Section 4: Monopolisation of Out-of-Court Legal Services

Section 1: Introduction

This and the following sections aim to portray the formation and monopolisation of the legal profession in Japan as processes that led to the completion of the "professional project". Lawson analysed the importance of the monopolisation of occupational areas and the market in examining and understanding the process of professionalisation.¹ Abel argued that there were two kinds of market control: "production of producers" and "production by producers".² As this thesis focuses on the process of monopolisation of an occupational area, in this case law, there is an overlap with the second form of market control identified by Abel, namely production by producers.

This chapter demonstrates that theories of professional market monopoly can be usefully applied to the Japanese legal profession by showing how the profession established and expanded

¹ Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (California: University of California Press, 1977).

² Richard L. Abel, 'Comparative Sociology of Legal Profession', in Richard L. Abel and Philip S.C. Lewis (eds.), *Lawyers in Society, Vol.3: Comparative Theories* [Reprinted ed.] (Washington D.C.: Beard Books, 2005(1989), pp.106-110.

its occupational area to eventually create a monopoly of legal services. As well as the professionalisation process of law itself, the peculiarly Japanese features of this monopolisation are examined and clarified.

Section 2: Monopolisation of In-Court Legal Services

The monopolisation of court legal services was a long and complex process. Although the Japanese legal practitioners could not appear in court as representative in the Edo era, legal advocates (*daigen'nin*) of Meiji era recognised that they should conduct their work in court as legal representatives or counsellors for their clients as the Western lawyers did. The government as well as the Ministry of Justice therefore considered the scope of legal services that Japanese lawyers should be able to offer as representatives in court, which led to the Judicial Staff Regulations and Operating Rules of 1872 (*Shihō shokumuteisei*) providing that legal practitioners could act as procurators and counsellors in courts.³ Furthermore, the Revised Regulations for Legal Advocates of 1880 stipulated that a legal advocate (*daigen'nin*) who had received a litigant's permission could act as their legal representative in any litigation which allowed agents to represent parties. The Attorney Acts of 1893 further defined their scope of occupation in court.

However, legal advocates did not enjoy a monopoly on legal services in court; anyone could appear in court (including the Supreme Court) as a representative of a party and a counsellor for an accused, after a qualification system for legal

³ Article 43 of the Act for Judicial Organization and Procedure (*Shihō shokumu teisei Dajōkan Tasshi*, no number, 1872). The court permitted a legal representative or counsel for a person unable to conduct a case on their own, in order to avoid making false charges.

practitioners was introduced in 1876 by the Regulations for Legal Advocates (*Daigen'nin kisoku*). Further, the Attorney Act of 1893 did not explicitly prohibit the practice of legal services in court by unqualified legal practitioners (*dainin*). Rather, it only provided that legal advocates could supply legal services in court; there were no penalties for the provision of services by unqualified legal practitioners.⁴ There had been a proposed penalty clause for such unqualified legal services in an earlier version of the bill, but this was deleted during Upper House arguments in December 1890, for two reasons: it could not be prohibited self-representation by the parties themselves, and could not ban lay-representation or lay-counsels by the parties' relatives or acquaintances in consideration of the legal practice from Edo era. In addition, as the shortage of legal advocates in rural areas was a serious problem, a ban on unqualified legal practitioners was not realistic.⁵ Moreover, Article 63 Section 2 of the Civil Procedure Code of 1890 stipulated that relatives or employees of the parties may serve as lay representatives for parties when there were no attorneys in the area of jurisdiction, despite Section 1 of the same article stipulating that an attorney shall be the legal representative for plaintiffs and defendants.⁶

⁴ When the draft of Attorney Act was submitted into the Imperial Diet in 1890, Article 44 of the draft stipulated the penalty (impose a fine) over the unqualified practitioners' practice in court. *Kizokuin Giji Sokkiroku*, Dai ikkai Tsūjōkai, Giji sokkiroku No.1 (4 December 1890), p.15.

⁵ The penalty clause was finally deleted by the government. *Kizokuin Giji Sokkiroku*, Dai ikkai Tsūjōkai, Giji sokkiroku No.8 (23 December 1890), pp.131-132.

⁶ Law No.29, Civil Procedure Code (*Minji soshōhō*) (21 April 1890). Section 3 Article 63 of this law provided that in a word court, relatives or employee with

It's worth noting that although Article 179 of the Criminal Procedure Code of 1890 stipulated that counsellors should be chosen from a list of attorneys held by the court, with the court's permission a non-attorney could act as a counsellor.⁷ Therefore, both legal advocates and unqualified legal practitioners could appear in court between the years 1876 and 1893; after that point unqualified legal practitioners continued to practice in court for a few years before ceasing completely.⁸ Though it is very difficult to ascertain exactly when they were relegated to out-of-court legal services, attorneys have enjoyed a monopoly on the provision of legal services in courts at least since 1896. The Ministry of Agriculture and Commerce made an inquiry to the government regarding the Petition Act of 1890 as to whether or not a party could submit a petition via a proxy (representative),⁹ which the government answered in the affirmative on 26 June 1896. Specifically, the government wrote that despite the opinion of the Ministry of Agriculture and Commerce that 'in the same way as administrative litigation and civil litigation, the proxy shall

litigation capacity a person may serve as a legal representative may for parties when attorneys do exist within the area.

⁷ Law No.96, Criminal Procedure Code (Keiji soshōhō) (7 October 1890). The further research is necessary to find the fact whether or not the word 'non-attorney' includes a legal practitioner. This clause was taken over Article 31 of Criminal Procedure of 1948 stipulated the same clause; (1) A counsel shall be appointed from among lawyers. (2) In a summary court, family court or district court, any person who is not a lawyer may, with the permission of the court, be appointed to be a counsel; provided, however, that this shall apply, in a district court, only when there is another counsel appointed from among lawyers.

⁸ The difference between qualified lawyers and unqualified legal practitioners were whether or not the legal practitioner shall deal with two different cases simultaneously; Notification No.2 of Shihōshō futatsu kō of 1880 prohibited unqualified legal practitioners dealt with more than two cases at the same time.

⁹ *Kōbun ruishū* Vol.20 Meiji 29 No.26, "Seigan wa tanin ni i'ninshi dainin wo motte teikisurukoto wo urumono to kokoroeyo" (National Archives of Japan 00769100-026).

not be utilised in petition,' proxies should be allowed to present petitions.¹⁰ Based on this answer I hypothesise that in administrative and civil litigations legal practitioners were no longer employed as proxies in court at least after 1896.¹¹

Moreover, Article 54 of the 1890 Criminal Procedure Code stipulated that those intending to file complaints or accusations could delegate this to a proxy (i.e. legal practitioner).¹² Further, Article 6 of the Non-Contentious Procedure (regardless of the normal proceedings, court decides the guardianship judgment with a simple procedure; e.g. partition of an estate (inheritance), change of custody, company registration, etc.) stipulated that any person connected with a case can utilise a representative but that the court can dismiss any such person if they lack legal qualification.¹³ Therefore, excluding acting as a litigation proxy or as a counsellor in court, it does seem that legal practitioners were able to conduct court-related work.

As a tentative conclusion it appears that in civil litigation at least there were no legal practitioners acting as proxies (legal representatives) in court from 1896 onwards. The

¹⁰ *Ibid.*

¹¹ There is an episode in Hōgaikoji "Sanbyaku no kōben" (Vol.10, 1898), *Nihon bengoshi kyōkai rokuji: Meiji-hen*, Vol.2 (Reprinted ed. Tokyo: Yumani Shobō, 2004), pp.600-601; a judge was irritated a plaintiff because he stated the fact again and again precisely, but did not mention any legal issues on the fact. Then, the judge asked him to stop self-representation and utilise legal advocates. The plaintiff said he had conducted legal service in court as an unqualified legal practitioner until a few years ago, therefore he could do on his own. This episode shows us the unqualified legal practitioners could appear in court around 1896.

¹² Law No.96, Criminal Procedure Code (Keiji soshōhō) (7 October 1890).

¹³ Law No.14, Non-Contentious Procedure (Hishōjiken tetsuzukihō) (21 June 1898).

shortage of attorneys is one reason why the monopolisation of legal services in courts by legal advocates was not complete until the late 1890s and why unqualified legal practitioners were still providing services relating to non-litigious court work after the 1890s. From the very beginning of the Meiji era to 1890, judges outnumbered legal advocates because the Ministry of Justice recognised that unqualified legal practitioners were still necessary for the judicial system to function.

Section 3: Differentiation of Out-of-Court Legal Services

After the monopolisation of legal services in court, attorneys were faced with the following two issues: obtaining a qualification equivalent to that of judges or prosecutors, and monopolising out-of-court services. The former issue was resolved in 1918 by the introduction of a unified examination for attorneys, judges and prosecutors (enforced in 1923), as was discussed in Chapter 4; this section therefore concentrates on the latter issue in order to reveal how attorneys sought to monopolise out-of-court legal services.

Between the 1893 enactment of the Attorney Act (Bengoshi hō) and its revision in 1933, the monopolisation of the Japanese legal profession by themselves progressed inexorably. In the early 1910s new forms of out-of-court legal services began to evolve and be offered to clients because companies began to focus on preventive law, such as scrutiny of the agreement by an increase in the import and export business due to industrialization. This led to the emergence of quasi-lawyers to provide this new expertise and to demands by attorneys for control over these new competitors and their emerging fields. Initially attorneys had helped develop these new law-related services and to aid in the professionalisation of the practitioners, and there was gradual social approval of those providing out-of-court legal services. Subsequently however attorneys absorbed these services into their own fields of expertise and began to eliminate any competitors

who had not obtained the relevant legal qualifications.

3-1 Economic and Social Circumstances

Japanese industrialisation began in the 1890s and light industry took off in the 1900s. From the mid-1910s to the early 1920s Japan experienced major structural changes brought about by the development of heavy chemical industries and by capital accumulation resulting from the establishment of industrial and financial business conglomerates (*zaibatsu*). For the legal world one result of this economic reorganisation was the emergence of out-of-court legal services such as contract drafting, patent-related work and services relating to corporate formation. Changes in social relationships also led to an increase in the number of incidents of civil conflict in the 1920s, such as those between landlords and tenants and between employers and employees. This led to the passage of several conciliation acts after 1922¹⁴ and an increase in the number of settlements before oral proceedings could commence (settlement prior to filing).¹⁵ Out-of-court settlements also grew in importance during this period.¹⁶

¹⁴ While the total number of civil law suits filed in local ward courts was 138,117 in 1919, it was more than doubled, 276,286 in 1926. The same is true for the Districts Court. The number of litigation filed there was 27,283 in 1919, and rose to 43,306 in 1926.

¹⁵ The number of "settlement prior to filing" was about 600 or 700 annually between 1912 and 1917; then the number of "settlement prior to filing" became 1,088 in 1919, and 2346 in 1920, 6,840 in 1924, and over 10,000 in 1927, and finally over 30,000 in 1932. See Reiji Hayashiya, Ikuo Sugawara, Makiko Hayashi, Akiko Tanaka (eds.), *Tōkei kara mita taishō · shōwa ki no minji saiban* (Tokyo: Jigakusya, 2011).

When the "settlement prior to filing" succeeds to resolve a problem, parties may ask the court to deliver the record of settlement which shall be the same effect as the court judgement.

¹⁶ Takao Itō, *Taishō demokurashī-ki no hō to shakai* (Kyoto: Kyoto Daigaku

The social circumstances (industrialisation) contributed to the emergence of law-related occupations in the mid-1910s. Beginning in 1919 there was intense debate in the Imperial Diet over the range of legal authority to be exercised by those professions later referred to as legal scriveners (later, *shihōshoshi* lawyer, 司法書士), patent attorneys (弁理士) and accountants (会計士).

3-2 Quasi Lawyers' Professionalisation

The principal actors responsible for the establishment of these new occupations were attorneys who also served as Members of the House of Representatives. The first step in the process of establishing *shihōshoshi* lawyers was taken in July 1903 at a regular meeting of the nationwide lawyers' association (*Nihon bengoshi kyōkai*), when attorney Yoshitarō Urabe proposed a discussion topic: "On an enactment concerning scriveners (*daishonin*)". Four key points were made during the discussion.¹⁷ Firstly, Urabe himself argued that rules for regulating those who wrote legal documents on someone else's behalf were needed. According to Urabe the fundamental reason for scriveners' frequent misconduct was the absence of a standardised qualification system. He proposed the introduction of an examination for scriveners as

gakujiutsu shuppankai, 2000), pp83-114; Yoshihiko Kawaguchi, *Kindai Nihon no tochiō Kan'en: 1920-nendai kosaku rippō ni okeru tochi shihaiken to hō* (Tokyo: Tokyo Daigaku shuppankai, 1990), pp.233-266.

¹⁷ "Nihon bengoshi kyōkai rokuji" No.67, in *Nihon bengoshi kyōkai rokuji Meiji hen*, Vol.13 (Tokyo: Yumani shobō, 2006), p.130.

demanding as those for judicial research officials or ordinary civil officers. A limitation on the number of scriveners per jurisdiction was also suggested.¹⁸ A second key point, made by another lawyer, was that the use of scriveners would decrease if filing suit without having consulted a lawyer was banned through amending the Civil Procedure Act. A third opinion proposed that the private practice of law should be criminalised. Finally, a fourth opinion, which emphasised the necessity of eliminating placement agencies for litigations and litigants (*soshō shōkai gyōsha*) to legal advocates, proposed that rather than the government enacting new legislation the Ministry of Justice should issue a ministerial ordinance in order to regulate scriveners' activities. The final proposal made by the lawyers' association combined the first and the fourth opinions, that is, a request was made to the Ministry of Justice to enact rules for the regulation of scriveners. The association thus erred towards preferring regulation, even though the outline of prospectus for scrivener bill written by attorneys' members of Diet submitted informally to the ministry in October 1903 contained a request for a qualifying examination to be introduced.¹⁹ Either way, the crucial point is that members of the association recognised that

¹⁸ For other proposals of Urabe, see Tokyo shihōshoshikai Kaishi Hensanshitsu (ed.), *Tokyo shihōshoshikai shi: Jō* (Tokyo: Tokyo shihōshoshikai, 1998), pp. 181-182. See Makiko Hayashi, "Nihon niokeru ho senmonshoku no kakuritsu", in *Hō no ryūtsū* (edited by Hiromitsu Suzuki, Chika Takatani, Makiko Hayashi and Jiro Yashiki) (Tokyo: Jigakusha, 2009).

¹⁹ Eizaburō Morinaga, "Meijinenkan no daishonin", *Shihō no mado* No.52 (1979), pp.74-78; Tokyo shihōshoshikai kaishi hensanshitsu (ed.), *Tokyo shihōshoshikai shi Jō*, 1998, p.184.

the Ministry of Justice was the authority responsible for the regulation of scribes' conduct.²⁰

Three key groups of people were active influences on the enactment process of the law regulating judicial scribes: the scribes themselves, judges and, as noted above, members of the Imperial Diet who were themselves attorneys. At the 30th Imperial Diet in 1912 scribes petitioned for the establishment of a qualification system and also requested permission to organise a professional body for their occupation. This petition was accepted by the 36th Diet in 1915.²¹

Judges exerted considerable influence on the increase in scribes' authority through the granting of 'permission' to individual scribes to conduct their activities in individual courts. From about 1904, those employed in the field were under the regulation of scribes which were stipulated by police and the local governments (*daishonin torishimari kisoku*) established by each prefecture. Either a prefectural governor or police station of each district ordinarily assumed authority for approving the scribes' business, although this varied by prefecture.²² This meant that the executive branch had firm control over scribes. Furthermore, court judges (i.e., judges in

²⁰ Fumitarō Kasahara, "Sorishitā hō seitei (sanbyaku kōnin) ron", *Nihon bengoshi kyōkai rokuji* No.174, (1913); Fujiya Suzuki, "Sanbyaku taiji no issaku", *Nihon bengoshi kyōkai rokuji* No.200 (1915). See Hashimoto, *Zaiya "hōsō" to chiiki shakai*, (Kyoto: Hōritsu bunkasha, 2005), p.249ff.

²¹ Petition 6 and 29 November 1916, "Saibansho daisho gyōsha ni kansuru hōkiseitei seigan no ken" (NDL 2A-014-00-01370100).

²² Hashimoto, *Zaiya "hōsō" to chiiki shakai*, 2005, p.238.

District Courts) granted the right to some scribes to conduct their business *inside* court buildings. These privileged scribes were referred to as scribes-at-court (*kōnai daishonin*), and gradually began to be differentiated from those other unprivileged scribes who conducted their work as side-businesses within their own taverns located near local courts.²³ Members of the Diet reported that approximately one-quarter of all scribes were permitted to operate their businesses inside court buildings as of 1916.²⁴ Difficulties inherent within the Civil Procedure Act of 1890 might explain this situation,²⁵ as although the act encouraged parties in litigation to testify orally without the assistance of a lawyer, ordinary citizens lacked the capability to participate in oral-based trials at that time, especially without a lawyer. Courts must consequently have welcomed the aid of judicial scribes with legal knowledge to pro-se parties (self-representation), as it would have streamlined the litigation process in terms of time and cost. Through the process related above judicial scribes with legal backgrounds came to be distinguished from other ordinary scribes who drew up documents for official use in court, thus identifying their specific area of occupation as that of preparing documents especially for court

²³ Nihon shihōshoshi rengōkai (ed.), *Nihon shihōshoshishi: Meiji · Taishō · Shōwa* (1981), pp.261-264. There were only three or four scribes in a court even in Tokyo under the limited permission.

²⁴ At the 36th Imperial Diet, 26 May 1926, it was said that one fourth were approved; they had been court clerk.

²⁵ Yoshinobu Someno, *Kindaiteki tenkanki ni okeru saiban seido* (Tokyo: Keisō shobō, 1988), p.242pp.

use.

As noted above, diet members who were qualified as lawyers made a concerted effort to pass laws creating new law-related occupations. Some of the leading lawyers of the nationwide lawyers' association (Nihon bengoshi kyōkai) aspired to improve their image and achieve a social status equivalent to that of barristers in England and Wales. In order to realise this goal an occupation equivalent to that of solicitor in England and Wales was necessary. It was hoped that this would achieve two aims, firstly raise the social reputation of the legal profession in Japan and thus give lawyers a relatively higher status vis-a-vis other law-related occupations, and also giving scriveners' of relatively higher status compared to "pettifoggers" on the other.²⁶ The resultant Proposal for the Qualification of Scriveners faced strong opposition from government MPs in the Diet's debate, but the Judicial Scriveners Bill passed the House of Representatives at the 37th Diet and after submission by Fujiya Suzuki was finally passed by both the Houses of Representatives and the House of Lords at the 41st Diet in 1919.²⁷

The bill, which was modelled after the Attorney Act of 1893,²⁸ stipulated that there would be a qualification examination system, mandatory membership in the Association of Judicial Scriveners

²⁶ Teruhiko Okamura, "Wagakuni bengoshikai oyobi bengosi to eikoku bengoshikai oyobi bengoshi", *Nihonbengoshi kyōkai rokuji* No.123 (1908).

²⁷ Tokyo shihōshoshikai kaishi hensanshitsu (ed.), *Tokyo shihōshoshikai shi: Jō*, 1998, p.260.

²⁸ "Benrishiō-an hoka ikken iinkaigiroku dai 3-kai", 24 February 1919, *Teikokugikai shūgiin iinkaigiroku*, Vol. 21 (Kyoto: Rinsen shoten, 1983), p.271.

and a separate, autonomous body to be established in each District Court, as well as disciplinary procedures and other measures.²⁹ However, the bill only required judicial scriveners to obtain permission from the President of their local District Court in order to conduct business. Provisions concerning a qualification examination and the establishment of an autonomous body were omitted from the Act.³⁰ Despite this step back, the fact that an occupational area to be filled by "judicial scriveners" had been designated "to make documents as business for the purpose of submitting to either court or prosecution office in the commission of other party" (Section 1) should be recognised as the emergence of a new law-related occupation.

The process by which the profession of patent attorney was established will be addressed. The Patent Attorneys Bill was proposed to the House of Representatives in 1919 together with the Judicial Scriveners Bill, and both were sent to the House of Representatives committee for discussion on the Judicial Scriveners Bill and the Patent Attorneys Bill. The sponsor of both bills was Fujiya Suzuki, a lawyer who belonged to the Tokyo Lawyers' association as well as a member of the Diet. According to Suzuki, the main aim of the Patent Attorneys Bill was to establish the occupation of patent agent as a profession. The Ministry of

²⁹ Fujiya Suzuki (1882-1946), see *Nihon hōsōkai jinbutsu jiten dai 8-kan* (Tokyo: Yumani shobō, 1996), p.660.

³⁰ *Nihon shihōshoshi rengōkai* (ed.), *Nihon shihōshoshi shi: Meiji · Taishō · Shōwa*, 1981, pp.317-320.

Justice and the government opposed the Bill, however, fearing possible overlaps between the spheres of work covered by lawyers and patent agents. One of the reasons for this fear was that a provisory clause in Article 1 of the bill stipulated that patent attorneys had the right to appear in court. While Suzuki argued that patent attorneys should be allowed to appear in court in the near future as assistants (*hosa'nin*) to lawyers in patent cases, Naomichi Toshima, a member of the committee, strongly opposed this, insisting that court-related work should be conducted by qualified lawyers as set down in the Civil Procedure Act.³¹ Despite Toshima's resistance the Patent Attorneys Bill passed in 1921 as Law No.100, introducing a qualifying examination, a professional body with mandatory membership and a disciplinary committee. The Ministry of Agriculture and Commerce was given supervisory authority over patent attorneys.

Thirdly, the process by which the accounting profession was established is briefly discussed. The first bill that aimed at doing this was submitted under the name of Accountants Law in February 1919 and sent to the House of Representatives committee for discussion on the Accountants Law. Although the bill was first proposed by Tatsuji Kondō,³² its main supporter, Masutarō Takagi, led the task of explaining the aim and content of the bill.³³ At

³¹ "Benrishihō-an hoka ikken iinkaigiroku dai 2-kai", 22 February 1919, *Teikokugikai shūgiin iinkaigiroku*, Vol. 21, 1983, p.268-270.

³² Tatsuji Kondō (1875-1931), see *Nihon hōsōkai jinbutsu jiten dai 8-kan* (Tokyo: Yumanishobō, 1996), p.224, p.542.

³³ Masutarō Takagi (1869-1929) submitted the bill of accountants' law over four times, then the bill could pass in the House of Representatives; it became the

that time the public perception of accountancy was relatively low and accountants were seen as no better than pettifoggers, who similarly lacked public trust. Takagi argued that one reason for this was that accountants were not legally authorised, despite there being many highly-skilled and independent accountants. He emphasised the necessity of legal validation in order to raise their status and reputation.³⁴ The Committee however was not able to complete deliberation of this bill, nor of the Accountant's Bill proposed by Naohiko Seki in 1920.³⁵ Finally however the Ministry of Commerce and Industry put their weight behind the bill and it eventually passed as the Accountants Law, Law No.31 of 1927 (Keirishi hō).³⁶

We have shown that those Diet members who were also attorneys were eager to establish new law-related occupations and took various actions to that end from 1919 onwards. One result was the Legal Scrivener Act (Shihōdaishonin hō) of 1919, and another was the Patent Attorneys Act of 1921. Both acts met with little resistance from lawyers' bodies, for a number of reasons. Regarding the former act, it was clear that legal scriveners would not encroach into lawyers' territory because the services provided by scriveners were highly restricted to the production of

unfinished in the House of Lords.

³⁴ "Keirishihō-an iinkaigiroku dai 3-kai", 24 February 1919, *Teikokugikai shugiin iinkaigiroku* Vol. 21, 1983, p.142.

³⁵ Naohiko Seki (1857-1934) had also submitted the bill of Control of the Handling of Legal Services and Prohibition of the provision of legal services by non-attorneys.

³⁶ "Keirishi ni tsuite", *Hōritsu shinbun* No.2674, 15 April 1927, p.3.

documents submitted to either courts or prosecution offices. In addition, no qualifications were required for producing such documents, and lawyers were therefore not concerned over the loss of work. Regarding the Patent Attorneys Act, one reason why lawyers were not overly concerned was that they were automatically qualified to act as patent attorneys,³⁷ while the reverse was not true. This meant that the legal establishment of the new profession of patent attorney expanded the range of work available to lawyers and created another layer of hierarchy within the law-related occupations. Although being placed below lawyers within this structure accountants (*keirishi*) found themselves situated above judicial scriveners, because qualification as an accountant required them to pass a master of accounting course at a technical college or higher school. This merely served to emphasise the fact that there was still no requirement for judicial scriveners to be qualified at all. These legal developments thus served to reinforce the hierarchy that already existed within the law-related occupations, but also added further layers to it; needless to say, lawyers remained at the top of the pyramid.

³⁷ Patent agents (later patent attorney), if qualified as a lawyer (*bengoshi*) or working over two years as a higher officer at patent office of the Ministry of Agriculture and Commerce, was able to register without going through a test since 1909 (Article 2, Edict No.300, 25 October 1909). See Tsūshō Sangyōshō (ed.), *Shōkō seisakushi*, Vol.14: *Tokkyo* (Tokyo: Shōkō Seisakushi Kankōka, 1964), pp.455-479, pp.623-626; Benrishikaishi Hensan Iinkai (ed.), *Benrishikaishi* (Tokyo: Benrishikai, 1959), p.47-66. See also Benrishikai (ed.), *Benrishikaishi: kōki 2600-nen kinen* (Tokyo: Benrishikai, 1941); Benrishi Seido 100-shūnen Kinen Jigyō Jikkō Iinkai Kaishi Hensan Bukai (ed.), *Benrishi seido 100-nenshi* (Tokyo: Benrishikai, 2000).

3-3 Monopolisation of Out-of-Court Services

In the late 1920s however, the national bar and the government changed their position. They both began to oppose the professionalisation of judicial scriveners once the judicial scriveners themselves began to push for various measures to be taken as part of that professionalisation.³⁸ Amongst other requests, scriveners had called for the following: a change in their job title from judicial scrivener to Ritsushoshi lawyer (律書士); the introduction of a qualifying examination; the establishment of an autonomous body with a mandatory membership system; self-authority over the disciplinary process; and the expansion of their work to include a right of audience in non-confrontational cases. However, although judicial scrivener reform bills were submitted to the Imperial Diet several times in 1929 and thereafter, they faced strong opposition in the Diet and were unsuccessful other than in changing their title in 1935 from judicial scrivener to Shihōshoshi lawyer.

It was in the late 1920s, when out-of-court legal services began to play a more important role as a form of legal practice, that attorneys (*bengoshi*) faced up to the reality that the expansion in the range of services offered by judicial scriveners as a result of their ongoing professionalisation was having an

³⁸ "Shihōdaishonin hō chū kaisei hōritsu-an ni taisuru Tokyo bengoshikai oyobi Nihon bengoshi kyōkai no hantai iken", *Hōritsu shinbun* No.3525 (1933); "Shihōdaishonin hō chū kaisei hōritsuan ni taisuru Osaka bengoshikai no hantai ketsugi", *Hōritsu shinbun* No.3527 (1933). Other bar associations expressed their dissent in *Hōritsu shinbun* No.3523; No.3535; No.3660.

impact on their (attorneys') businesses. Both local lawyers' associations and the national body strongly opposed the Revised Judicial Scriveners Bill passed by the Lower House on 21 February 1933. As a result, the bill was rejected in the Upper House and did not become law. There were three main reasons for this opposition from the associations. Firstly, they opposed the name-change to 'Ritsushoshi lawyer' (律書士) as it seemed to imply that judicial scriveners would be able to carry out the work of both scriveners and lawyers. Secondly, judicial scriveners aimed to expand their work to include non-contentious cases, as specified in the provisory clause of Article Nine of the Revised Judicial Scriveners Bill of 1933.³⁹ Local lawyers' associations and the national lawyers' association (Nihon bengoshi kyōkai) objected to this because such cases exerted a great influence on many fields involving the status and property of nations related to the Conciliation Act for Land and Building Leases, the Act on Temporary Treatment of Rental Land and Housing, the Act on Auctions, the Real Property Registration Act and the Conciliation Act on Temporary Treatment of Debts. In addition, the lawyers' associations argued that the occupational area allotted to judicial scriveners in the bill was unfairly wide and that the

³⁹ Non-contentious civil cases include the following: judicial subrogation(裁判上の代位), deposit/sequestration(供託), custodian(保管), administration of property(財産管理), expert opinion (鑑定), testament executor, acceptance and renunciation of inheritance, family meetings and registration of corporations or Marital property agreements, and corporate liquidation, compulsory sales in commercial non-contentious cases.

term 'receipt of documents' could be interpreted as meaning not only submission of applications but also the termination of proceedings. The third main reason for opposition to the revised bill was highlighted by the Osaka lawyers' association, who pointed out that the qualification of judicial scriveners in the provisory clause of the bill stipulated that public notaries were not required to pass a qualification examination to work as judicial scriveners. They argued that such a clause could mistakenly lead people to believe judicial scriveners were of equal rank to judges, public prosecutors, lawyers and notaries, because Notary Act Articles 12 and 13 stipulated that judges, public prosecutors and lawyers could serve as notaries without having any specific qualification.

To conclude this section, let us examine what Rabinowitz had to say on the topic:⁴⁰

It will be recalled that until 1876 the lawyer's was not, properly speaking, an occupation at all. After that date the monopoly in dealing with legal problems did not extend beyond the courtroom. In spite of this, the Japanese lawyer has never become in law or in fact purely an advocate not engaged in a wide variety of non-advocacy functions. At present he is free to perform the functions of the judicial scrivener, the tax agent, and the patent attorney. It is a

⁴⁰ Richard W. Rabinowitz, "The Historical Development of the Japanese Bar", *Harvard Law Review* Vol.70, No.1 (1956), pp.79-80.

commonly accepted fact that he shares the performance of counselling activities with the *sambyaku daigen*. The latter may or may not be engaged in a legitimate occupation, performance of which resembles that of the lawyer in some respects. If the lawyer role is not confined to advocacy, and if it shares the performance of a more broadly defined role with those lacking indicia of professional status, to that extent will the professional nature of his own role be difficult to establish and maintain.

One thing that must be clarified is the reason that Japanese attorneys were able to perform the varied functions of the judicial scrivener, the tax agent and the patent attorney. It was not, as Rabinowitz mistakenly argued, because legal advocates and attorneys had taken over from unqualified legal practitioners the out-of-court service role from the Edo era; rather, it was their intensive pursuit of the monopolisation of out-of-court legal services that enabled them to position themselves at the apex of the legal occupation hierarchy.

To conclude, many out-of-court services appeared following the industrialisation of the mid-1910s onwards, and attorneys helped craft these new law-related professions. Although Japanese attorneys identified themselves primarily as the in-court representatives of their clients, they also began in the 1920s to seek, or arguably create, new professional spheres and to

establish an occupational monopoly on out-of-court services. As we have seen in this section, to gain monopoly on in- and out-of-court services for attorneys caused problems between the profession and the government.

Section 4: Monopolisation of Out-of-Court Legal Services

From the mid-1920s onwards, attorneys and lawyers' associations began to argue for a monopoly on out-of-court legal services. In April 1925 the Out-of-Court Legal Services Bill was submitted for discussion to the 50th Imperial Diet by Naohiko Seki and four other MPs.⁴¹ This bill had originated as a Tokyo Bar Association plan in March 1921, drawn up as a resolution against pettifoggers. The Association and its research committee had then drafted a prohibition against pettifoggers in January 1925. The second clause of this committee proposal was similar to the first clause of the bill introduced to the Diet. Although the bill did not pass, it was the first step towards the eventual enactment of the Out-of-Court Legal Services Control Act in 1933.

In a parallel development the Ministry of Justice had set up a committee for examining the Attorney Act in October 1922. Although the stated purpose of this committee was to revise the act, they also decided to restrict unqualified legal practitioners from conducting out-of-court legal services. Previous Ministry of Justice proposals had not settled the question of whether unqualified legal practitioners should be prohibited from offering such services, with some officials insisting that such practitioners were still necessary to ensure the provision of

⁴¹ From 1912 to 1922, there were four petitions submitting to the Imperial Diet. The main requirement of these petitions was, however, that remarks of a lawyer in the court shall be impunity; monopoly of qualified lawyers was not the theme until the end of 1920s.

legal services to outlying regions. The Attorney Act Revision Bill of October 1927 therefore included a compromise clause which declared that unqualified legal practitioners could not conduct any *onerous* legal services out of court. However, the original Ministry of Justice bill of 1930 stipulated that the Minister of Justice could prohibit such conduct. Criticism of this clause was so strong, however, that the Ministry of Justice revised its original bill to prohibit unqualified legal practitioners from handling out-of-court legal services.

However, the first step in the Ministry of Justice's original plan concerning out-of-court legal services was to establish a new occupation which would undertake out-of-court mediation and regulate the occupation under the supervision of the Minister of Justice. Documents indicate that plans to establish this new legal occupation were thus in their early stages, but were ultimately never put into effect.

As noted above, attorneys gradually moved to monopolise out-of-court law-related work. This development progressed hand-in-hand with their continued opposition to the expansion in scope of the various other existing law-related occupations (above all, of judicial scriveners) and to the emergence of other law-related occupations. This section will address the reasons for this hostility towards other law-related occupations.

There were two reasons for this opposition. Firstly, the dramatic increase in newcomers to the profession between 1920 and

1923 had led to far greater stratification of law-related work; secondly, many lawyers who were struggling to find sufficient work within their traditional range of services began to expand their range to include out-of-court legal work, thus encroaching on the vested interests of other law-related occupations. In addition, the government tried to exclude attorneys from their new mediation systems. Each of these reasons deserves further analysis.

Firstly, let us examine the rapid increase in the number of attorneys at both the national and local levels. The nationwide increase was brought about by the temporary expansion (increase) of the number of passers of both Examination for Jurists and Bar Examination. The local increase occurred mainly in Tokyo, and followed the nationwide increase. The total number of attorneys had exceeded 2,000 for the first time in 1900 but by 1921 had only climbed to 3,369. Despite this modest increase over 21 years, the number then rose to over 5,200 by 1923.⁴² This exceptional rise could explain from the following reasons; in both 1921 and 1922 examinations were held twice, and the pass rate in these years was higher than usual. As a result, about 1,830 newcomers entered the profession during this short period.

Secondly, the local increase in attorney numbers in Tokyo was a direct result of the nationwide increase. Driven in part by

⁴² John Owen Haley, *Authority without Power: Law and the Japanese Paradox* (New York: Oxford University Press, 1991), p.215, note (102). Haley investigated a newspaper Tokyo Asahi Shinbun from 1928 to 1931, and showed many cases of lawyers' conducting crimes, for instance, theft, fraud and extortion, and also about their bad behaviours.

the rapid urbanisation of the 1910s, a large percentage of the newcomers to the profession entered the Tokyo Bar Association. Although the proportion of all lawyers nationwide who were affiliated with the Tokyo Bar had been rising anyway, previously this growth had been manageable (e.g. from 26% to 28% of the national total from 1893 to 1910). However, by 1916 Tokyo accounted for 39% of all lawyers; by 1922 this had increased even further to 2,038 of the 3,914 attorneys in the country, a rate of 52%.

This rapid increase in numbers led to divisions within the Tokyo Bar Association. Most of the newcomers were not governed by the pre-existing notions of 'gerontocracy and tradition', and up-and-coming young attorneys attempted to remove or bypass these hangovers from earlier eras. Older attorneys, such as Yoshimichi Hara and Takuzo Hanai, could not tolerate new attorneys using their majority to take control, especially when it led to their loss of leadership in the Japan Association of Lawyers, a voluntary national organisation created to safeguard human rights which they had established at the end of the Meiji era. These attorneys eventually created a new lawyers' association in Tokyo (Dai-ichi Tokyo Bar Association) as a separate organisation through revision of the Attorney Act in 1923. They also set up the Teikoku Bengoshi Kai (Imperial Lawyers' association), a voluntary national organisation, as a rival to the Japan Association of Lawyers. Some of the attorneys who played leading

roles in the Dai-ichi Tokyo Bar Association and Imperial Lawyer's Association were devoted to creating quasi-lawyers in the period around 1919. They wanted Japanese attorneys to follow the British barrister model and create a more dignified profession. As late as 1929 they were still insisting that attorneys should not deal with out-of-court legal services in order not to denigrate their professional morals.

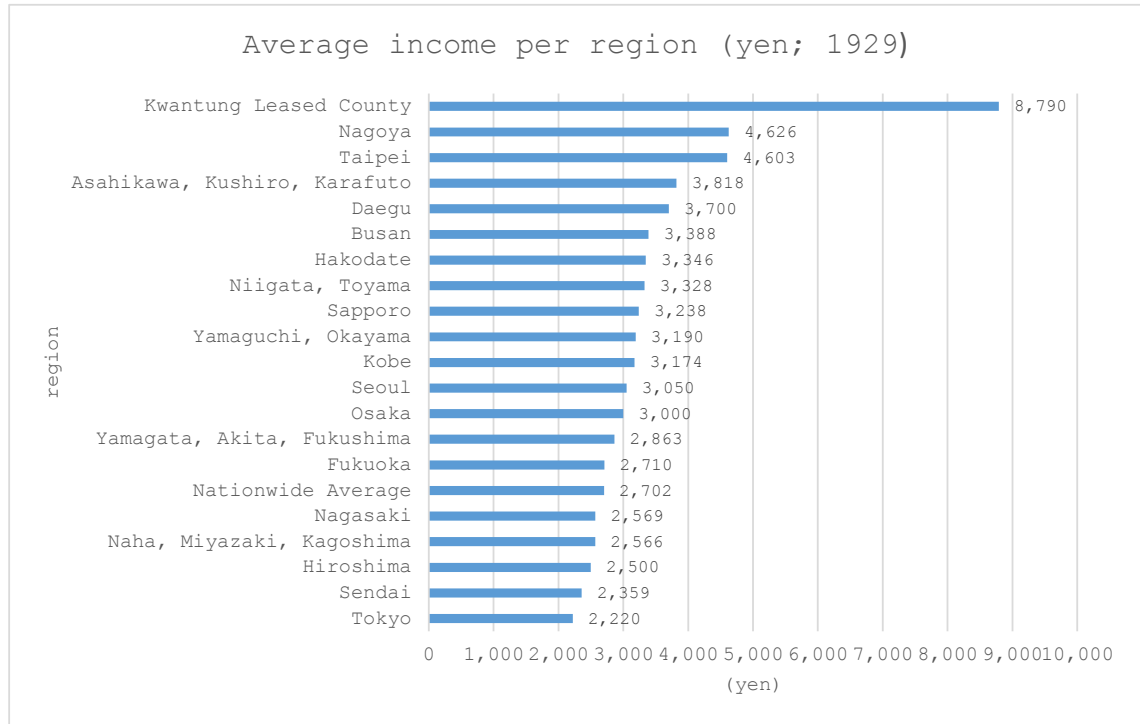
As the established attorneys formed new bar associations to maintain their social authority over the profession, many newcomers and younger attorneys who remained in the Tokyo Bar Association experienced economic difficulty. This was particularly acute from the late 1920s to the early 1930s. This was highly significant, as it led some in the Tokyo Bar Association to begin expanding the scope of their legal practices into out-of-court work aiming to monopolise that field and improve their livelihoods.

The following graph shows the average income of Japanese attorneys in 1929 by region.⁴³ The disparities are striking, as is the fact that Tokyo attorneys had the lowest average income nationwide. The statistics show that some, if not many, Tokyo attorneys would have been facing economic difficulties, or even

⁴³ "Zenkoku Bengoshi Keizai Tōkei", *Hōsō Kōron Shōwa* 5-nen 9-gatsu gō (1930), pp.30-64. The nation-wide bar association (Nihon bengoshi kyōkai) has conducted a questionnaire survey (mailing system) across the country attorneys. I created the graph on the basis of the data. Kwantung Leased Territory attorney gained the highest of net revenue across the country because it was added the salary as an administrator. Attorneys of the day realised the motions to appoint attorneys to the bureaucracy of Manchuria and other colonies.

hardship.

[Table 6-1] Average of Income (Yen) per region (1929)



Sadao Tasaka, a member of the Tokyo Bar Association, argued that attorneys should have a monopoly on out-of-court legal services; resorting to a notary act, being engaged in a trust act, and becoming a legal adviser or a judicial counsellor of a company. He pointed out that the scope of attorneys' work had narrowed following the conciliation acts of 1922, 1924 and 1926, and that summary trial procedures had imposed limits on the expertise of the legal profession.

The table of salaries of Japanese lawyers shows that the incomes of the Kwantung Leased territories and the major cities of Korea were much higher than the national average for lawyers' incomes. Incomes of lawyers in Tokyo was lowest in 1929. One of

reasons why lawyers' incomes of Kwantung Leased territories were higher than other places was because of the supports by the Japanese government: as lawyers were hired by the government and lawyers also could conduct private legal works as counsels, their incomes were guaranteed and became higher. Attorneys practiced in colonies and the national voluntary associations of lawyers did support to lawyers in colonies.⁴⁴ However, in general, lawyers faced on the economic difficulties.

Although the Teikoku Bengoshikai (Imperial Lawyer's Association) did not object to the plans to establish the new occupation (which they called 'official pettifogger') similar to an out-of-court mediator or the professionalisation of the judicial scriveners, not all its members agreed. Many ordinary attorneys, those without distinction in any of the lawyers' associations, hoped to obtain exclusive control over out-of-court legal work, particularly after the Great Depression of 1929. They felt the new mediation procedures the Ministry of Justice enacted in the 1920s and 1932 were unfair.

From the 1920s onwards the government enacted and utilised mediation procedures to amicably resolve problems relating to internal social relationships or communities. These procedures differed greatly from the conciliation (*kankai*) of 1875-1890, as they featured the participation of lay men and women as members

⁴⁴ Lawyers' contributions in colonies must study in depth in the future research.

of the mediation committees.

According to Hiroshi Takahashi, in terms of the role of legal professions, Leased Land and House Mediation Act was enacted based on the following institutional design: (A) With respect to the position of judges among Mediation Committee, (1) a judge was to preside each Committee because judges at that time were regarded as having capability of resolving disputes not (only) legally but substantially, (2) at the same time, however, civil members those who were not qualified as lawyer were expected to substantially support to manage Mediation Committee, and (3) all the members of Committee were ranked as higher, didactic officials who could lead parties to disputes to "righteous" settlement, and (B) With respect to the participation of practising lawyers to Mediation Committee, (1) while commitment to the mediation as a representative of party to the dispute was regarded as undesirable, (2) commitment to the mediation as a member of mediation committee was willingly accepted.⁴⁵

Some attorneys took a sceptical view of mediation, which they believed would become an obstacle to their work. However, lawyers played two roles in mediation schemes, and it's important to differentiate the two: they could act as the representative of a party to a dispute or as a member of the mediation committee.⁴⁶

⁴⁵ Hiroshi Takahashi "Shakuchi Shakka chōtei hō to hōritsuka: Nihon ni okeru Chōtei seido dōnyū no ichi Sokumen", Yoshihisa Hayakawa/ Aya Yamada/ Ryō Hamano (eds.), *ADR no kihon-teki shiza* (Tokyo: Fuma shobō and Shinzansha shuppan, 2004), pp.113.

⁴⁶ *Ibid.*, p.117

A considerable number of attorneys actively participated in the Leased Land and House Mediation Committee, for example. In Tokyo however, where more than 40% of attorneys were based, this was not the case; we can find evidence of very few lawyers who served on mediation committees there.⁴⁷ For attorneys, being a representative of parties in mediation session was not lead to open a new occupational area; rather, the principle of personal appearance in mediation became the inhibition factor of practice of law.

There was strong opposition to the enactment of the Money Claim Mediation Act of 1932 by attorneys and some of their associations. This mediation scheme, with the help of the administrative system, aimed to be a didactic solution to disputes. The Showa Depression and the Agricultural Depression, both stemming from the Great Depression of 1929, had led to massive debts for farmers and fishermen, as well as for small merchants; the Money Claim Mediation Act was established for the purpose of releasing people from the pressure of this debt and reconstructing their lives. From 1929 to 1932 most industries began to recover gradually, but agriculture and fishing struggled. As with European farmers, from the 1920s onwards beyond the social and economic differences between landowners and tenants, all most Japanese farmers borrowed their living expenses and fertiliser and

⁴⁷ *Ibid.*, p.120.

machinery costs, and as a result were saddled with great debts.⁴⁸

By emphasising the spirit of neighbour and community assistance, the government strongly promoted the creation of debt unions in neighbouring residents (village) units (*tonarigumi*), regardless of the presence or absence of liability; members of a debt union became jointly liable even if they had no debts of their own. The guarantee made possible by the neighbourhood debt unions made it possible to refinance the debts at lower interest. The unions created economic rehabilitation and debt repayment plans in order to conduct mitigation negotiations with creditors; if an agreement was established, the debtor would start payments based on these plans. If no agreement could be reached between a debt union and its creditors, the municipality's Debt Committee would commence mediation. If an agreement could still not be obtained via these private and administrative mediation attempts, or if the debtor was no longer able to keep up repayments in line with an established agreement, the creditors could submit a petition to the Money Claim Mediation scheme, which was then held

⁴⁸ There was a common problem about agricultural debt after the Great Depression around the world. After the World War I, the industrialisation of agriculture--agricultural chemical mechanics and electrification---and the establishment of the production, sales and transportation required costs of mechanisation. In addition, the appreciation of land and product prices due to inflation and the speculative land purchases caused a huge amount of debt. There was a diverse reaction by each country. In Germany, it was decided to enforce the Eastern Relief Act (*Osthilfegesetz*), in order to reduce the interest rate of the mortgage debt and to build a debt repayment plan for farmers. Then, in 1933 the debt Office (*Entschuldungsamt*) was set up for the purposes devaluating the debt itself and the like. On the other hand, France and Belgium sought to establish the agreement between creditors and debtors and decided the execution of moratorium. Japan was considering the way of organizing debts around the world to this time, and decided to conduct the aggressive German type. The difference between German and Japanese way of organizing debts was whether government was utilizing communities or not.

in court.

The Money Claim Mediation Act thus sought to enable the financial rehabilitation of the "honest debtor" by reorganising his debts (Article 1). It was decided that the act would target those with debts that did not exceed small claim monetary obligations, excluding the leased land and house and the farm tenancy (Article 2). As the law was seeking to enact a mediation system that had clear policy objectives as part of the government's attempts to cope with the effects of the Great Depression, a provision that noted "trial an alternative to mediation" (Article 7, paragraph 1) was inserted in order to encourage parties to cooperate with mediation attempts. Attorneys however remained strongly against Money Claim Mediation, as it not only impacted their incomes and living costs but also impinged upon creditors' rights.

To summarise, prior to the splits within the Tokyo lawyers' association in 1922 that led to the creation of the Dai-ichi Tokyo Bar Association and the Imperial Lawyer's association, attorneys endeavoured to create new law-related occupations, such as those of the judicial scrivener and patent agent. However, the rapid increase in the number of attorneys, especially in the Tokyo area, led to a surplus of lawyers and economic difficulties for many of them, particularly in the Tokyo area. In response, a majority in the Tokyo bar association expands the scope of their practice and monopolises the profession.

Being a qualified lawyer offered hope to those with left-wing sympathies who had been arrested by applying the Maintenance of Public Order Law could take the bar examination and became a lawyer, if passed the examination.⁴⁹ Some of those who had been involved in labour union movements passed the bar examination and became wartime attorneys, helping with such cases as tenant disputes⁵⁰ or with defending those accused of economic mandatory control violations. As these latter cases were similar to ordinary civil cases, attorneys found they could handle them with little difficulty. In addition, during the Fascist era (1931-1945) women were able to take the legal license examination (bar examination) for the first time and the first female attorneys began practising (1933 and 1936 respectively).

During the late 1930s and into the 1940s, Japanese society lost the fundamental function of modern law and legal systems. The legal profession qualification system made a small space of a society to have a hope that qualification is granted without being asked a thought creed, if passed the bar examination, even under the wartime.

⁴⁹ Osaka Bengoshikai, *Senjika no Bengoshi*.

⁵⁰ *Ibid.*

Conclusion

This thesis has shown that the key to Japanese legal professionalisation in the late 19th century was the formation of Japan's dual legal system. While previous discussions of Japan's legal history have been based on either the 'disconnection' model, which emphasises the gap in law-related practices between the Edo and Meiji eras, or on the continuity model, which stresses the linkage between the practices of these eras, I have proposed a third, more subtle explanation. It is certainly true that there was continuity in both practice and personnel; this was the foundation that enabled the 'dual' legal dispute resolution system to be established and operating by the early 1890s. This dual structure successfully utilised qualified and unqualified legal practitioners within a system that offered both adjudication and conciliation procedures. Both types of practitioner could and did serve in both the adjudication and conciliation procedures in various courts under this scheme. This hybrid judicial arrangement made it possible for litigants, as well as the government, to resolve both day to day conflicts and serious, complex legal disputes within a unified court system that showcased the rapid Westernisation of Japanese law and its legal systems.

Moreover, this thesis has shed light on the influence of Western lawyers on the law-making process during the early stages of the Meiji era. English barristers in particular exerted a great influence. The widespread understanding to date has been that only

foreign legal advisers and judicial officers, that is, only high profile and academic-oriented jurists, contributed to the codification of laws in the Meiji period. This is, however, a misconception that this thesis has sought to correct. Even in a continental-law country such as Japan, the true drivers behind new legislation were front-line practicing lawyers. In the 1870s and 1880s barristers conducted legal practices not only in the courts of the British legation and those of other countries, but also in the Japanese courts. That offered an opportunity for Japanese legal practitioners to encounter British barristers at first hand and witness how they delivered their services. British barristers used the full range of their skills for the benefit of their clients, drawing on a wide variety of sources to expand their claims and even visiting the foreign legations and offices of the Japanese government in order to initiate out-of-court negotiations. For the first time Japanese legal practitioners could watch and learn how Western lawyers behaved, planned and acted; in short, how modern professional lawyers practiced.

The acquisition of this knowledge regarding Western jurisprudence by Japanese legal practitioners served to drive the division between qualified and unqualified legal practitioners. Until 1876 these two groups had enjoyed identical status and powers, with only their occupational titles differing: those who had qualified could call themselves legal advocates, but in effect this amounted to no more than a professional nickname. However,

following the increased difficulty of the examination from 1880 and the progress made in the reception of Western law and legal systems, legal advocates began to build reputations based on their specialised knowledge of Western law. They began to form an occupational community and to develop a sense of a 'profession' built upon the imported philosophy of Western law as its common denominator; by contrast, unqualified legal practitioners had no such basis upon which to found a community.

As legal advocates increasingly recognised themselves as a discrete group of people who had proven their Western legal knowledge by having passed an extremely challenging exam, their sense of a collective consciousness strengthened further. This resulted in the enactment of the Attorney Act of 1893. When the first Attorney Act Bill was submitted to the Diet by the government in November 1890, legal advocates rejected it decisively because Article 11 of the bill stipulated the creation of demarcation lines between attorneys. The government withdrew the bill under pressure from influential political figures, as well as from legal advocates. In the subsequent 1893 Bill the complex legal qualifications that had featured in the earlier 1890 version were no longer included; although the qualification test and apprenticeships were still present, they were deleted from the final version before its enactment.

Through these enactment processes legal advocates further cemented their integration as a profession and their collective

consciousness as protectors of and campaigners for human rights on behalf of commoners throughout the country. One reason for legal advocates being able to form such an elite group was that the number of them was relatively limited. Because unqualified legal practitioners tended to be responsible for the vast majority of day-to-day legal work, qualified legal advocates could maintain unity as a vocational group.

The formation of a community, and just as importantly a sense of that community, is crucial to professionalisation in any field. Roger Cotterrell has identified four bases for community relations¹: 1) shared ultimate values or beliefs (which might be religious beliefs, but could equally be fundamental secular values such as human rights or human dignity); 2) shared or convergent economic interests or other instrumental projects; 3) traditions and customs or mere co-existence in an established shared environment; and 4) affective emotional ties. Of these four it is the first form, that of shared ultimate values or beliefs, that would seem to most closely approximate that pertaining in the establishment of the legal advocate (attorney) community, although shared economic interests were certainly also a factor. In this thesis however I have also proposed that the formation of Japan's

¹ Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot: Ashgate, 2006); Roger Cotterrell, "Community as a Legal Concept?: Some Use of a Law-and Community Approach in Legal Theory", in *Living Law* (Farnham: : Ashgate, 2010[2006]), pp.17-28; Roger Cotterrell, "From Living Law to Global Legal Pluralism: Rethinking Traditions from a Century of Western Socio-Legal Studies", *Kobe University Law Review* No.49 (2015), pp.242-260.

legal organisations seems to have drawn upon another base, namely the shared specialised and approved skills of the fledgling community. These included such practices as researching legal sources, making oral arguments in and out of court on behalf of their clients and writing legal as well as governmental documents including petitions and pleadings. As discussed in Chapter 4 it may well have been that unqualified legal practitioners also shared the legal advocates' dedication to Western values; however, they did not and could not have the specialised skills, nor the collective consciousness created by having studied for and passed an exam that publicly proclaimed their different status, a status founded upon their knowledge of Western law and legal systems.

The second phase of the formation of the legal profession in Japan began in 1884. From 1884 to 1890s legal practitioners and the procedures they had carried over from the Edo era disappeared from court; court systems were Westernised and the judges became qualified. The conciliation procedure had not been included in the 1890 Civil Procedure Code, leaving only the adjudication procedure. The dual system gradually disappeared in the first half of the decade, and non-credential legal practitioners began to exclusively conduct out-of-court services. These changes in practice that occurred during the 1890s were the culmination of the formal changes that had already taken place. For example, the Constitution had been enacted in 1889, regulations governing litigation and the court system were

completed in 1890 and the Imperial Diet sat for the first time in November 1890.

In the dual system that I discussed in this thesis the legal practitioners of the early Meiji era were still using their Edo-era legal methods, but lawmakers were beginning to apply Western legal philosophy to the legislative works. The resolution of everyday conflicts, which had been part of legal practice since the Edo era, continued into the Meiji, but at the same time, qualified legal advocates were engaged in various activities aimed at introducing freedom and civil rights to Japan. Continuity in practice and discontinuity in legal concepts and ideals contributed the dual system, and the dual system helped the gradual Westernisation and the assimilation of the Western ideas into the indigenous society.

As late as 1890 the government had argued that it was necessary to continue with the dual system. The 1890 Civil Procedure Code allowed pro-se litigation so that relatives and unqualified legal practitioners could act on behalf of parties, even in court. The 1890 Criminal Procedure Code made it clear that unqualified legal practitioners were still able to act as defence counsels. In a similar vein there was no penalty for unqualified legal practitioners acting for clients, even in court, in the 1893 Attorney Act.

By 1896 however unqualified legal practitioners had stopped appearing in court. Technically they were no longer able to work

in court; it was the period when the court westernised and modernised in details because of the enforcement of the revision of the unequal treaties of 1894 and the enactment and enforcement of the Civil and Commercial Codes. In contrast to the Japanese attorneys, who were able to form their professional body based on the ideas and specialised knowledge and skills they had acquired from the West, unqualified legal practitioners had no such option. Their lack of Western legal knowledge and specified skills, and the resultant nonexistence of any sense of collective consciousness, served to hamper any efforts at community-building.

This paper has also strongly refuted the consensus view to date of the Meiji government and bureaucracy as having provided autocratic and strong leadership in terms of managing as well as supervising attorneys. The number of attorneys was initially extremely limited. Those who were qualified were extremely knowledgeable, intelligent individuals who inevitably formed an elite professional group; in these early years they were certainly far more knowledgeable in Western law than the judiciary, whether judges or prosecutors. Indeed, attorneys complained that some judges did not have enough Western legal knowledge or skills to apply the law, and so the Ministry of Justice started to retire older judges from the judiciary from the end of 1898. This collective campaign was possible because they had successfully formed a unitary professional body of attorneys sharing both values and skills. Japanese attorneys were able to form a body

easily due to their Western legal knowledge and the values, completely new to Japan, that they had imported and adopted.

Despite the supremacy enjoyed by attorneys in the 1890s vis-à-vis their supposed political 'masters', they gradually lost this privileged position. The main reason for this was their inability to control the number of entrants to the field. Japan's attorneys have never been able to control the number of new entries to the profession or been able to restrict it; this remains the case today. As is the case in many continental-law countries, lawyers in Japan became a profession to be certified by the state. The 'Japanese attorney' was established in the Meiji era and the following years as a profession composed of a minority elite positioned at the apex of a range of other law-related fields; this elite was to be certified by the state, the very body that had 'created' them in the first place, as attorneys were not powerful enough to shake off the state's overall control of the field. This is a feature in other civil law countries as well as in Japan. Indeed, it was this very weakness that also led to the creation of a variety of other law-related practices and quasi-lawyers.

The construction of the dual judicial system in the Meiji era and the exclusion of the quasi-lawyers from the provision of out-of-court legal services in the 1920s and 1930s served to weaken the integrity of the legal profession at a time when many of the fundamental functions of Japan's legal systems were being

compromised by the nation's militarisation. However, the inherent justice and fairness of the legal profession's qualification system remained in wartime as a small beacon of hope to examination candidates who continued to believe in the primacy of the legal system.

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